Supreme Court, U.S.
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No. 97-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

VOLUME 2

Wm. J. Sheppard, Esquire
COUNSEL OF RECORD
Elizabeth L. White, Esquire
D. Gray Thomas, Esquire
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
COUNSEL FOR PETITIONER

February 4, 1998

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Gary Eldon ALVORD, a/k/a Paul Robert Brock, a/k/a Gary Eldon Venczel, Petitioner-Appellee, Cross-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, Respondent Appellant, Cross-Appellee

No. 83-3395.

United States Court of Appeals, Eleventh Circuit.

Feb. 10, 1984.

Rehearing and Rehearing En Banc Denied April 25, 1984.

Appeals from the United States District Court for the Middle District of Florida.

Before HILL and FAY, Circuit Judges, and ALLGOOD*, District Judge.

JAMES C. HILL, Circuit Judge:

Louie L. Wainwright, Secretary of the Florida Department of Corrections, appeals to this court from the order of the

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

district court holding invalid Gary Eldon Alvord's sentence of death and granting Alvord the writ of habeas corpus subject to the state's holding a new sentencing hearing. Alvord cross-appeals from the district court's denial of the writ on the other grounds raised in his petition. The Supreme Court's recent decision in Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), mandates reversal of the portion of the district court's order granting the writ; we affirm the district court on all other grounds.

In 1974, Alvord was indicted, tried, convicted, and sentenced to death in Hillsborough County, Florida on three counts of murder in the first degree The Florida Supreme Court affirmed Alvord's convictions and sentence, see Alvord v. State, 322 So.2d 533 (Fla.1975), and the United States Supreme Court denied

certiorari, see Alvord v. Florida, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). Alvord then filed a motion for reduction of sentence under Florida Rule of Criminal Procedure 3.800(b); the state court denied the motion, and the Florida Supreme Court refused a petition for a writ of mandamus in 1977. In 1978, Alvord filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850; the state court denied the motion, and the Florida-Supreme Court affirmed. See Alvord v. State, 396 So.2d 184 (Fla.1981). Alvord filed this case in federal district court in 1981. The district court, 564 F.Supp. 459, granted the abovedescribed partial relief, and both parties appealed.

I. RELIANCE ON NONSTATUTORY AGGRAVATING CIRCUMSTANCE

At Alvord's trial, the sentencing judge, after finding four statutory aggravating factors to be present, concluded his order imposing the death penalty by stating that Alvord "has been and [will] continue to be a danger and a menace to society and there fore must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida" The district court concluded that this statement demonstrates that the sentencing judge relied on a nonstatutory aggravating circumstance, see Miller v. State, 373 So.2d 882 (Fla.1979) (future dangerousness not a statutory aggravating factor); and, as dictated by our opinion in Goode v. Wainwright, 704 .F.2d 593, 612 (11th Cir.1983), held Alvord's death sentence constitutionally

invalid. The Supreme Court recently reversed Goode, see Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), and the state contends that the Supreme Court's decision requires us to reverse the district court. Alvord argues that constitutionally based distinctions require a different result in this case than the result reached by the Supreme Court in both Wainwright v. Goode and Barclay v. Florida, U.S., 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).[1]

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[1] The state argues on appeal only that Barclay and Goode allow the sentencing judge to rely on the nonstatutory factor in this case and does not contend that the failure of the trial judge affirmatively to find future dangerousness as an aggravating factor when listing the four (other) aggravating factors indicates that the trial judge did not rely on future dangerousness as a factor. We will assume for purposes of this opinion that the state judge relied on future dangerousness as a separate and distinct factor.

This case is the latest of several cases, including Goode, in which this court has addressed this issue. See, e.g., Proffitt v. Wainwright, 685 F.2d 1227, 1266-69 (11th Cir.1982), cert. denied, U.S. ___, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); Stephens v. Zant, 631 F.2d 397 (5th Cir.1980), modified, 648 F.2d 446 (5th Cir.1980), rev'd and remanded, ___U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), on remand, 716 F.2d 276 (5th Cir.1983); Henry v. Wainwright, 661 F.2d 56 (5th Cir. Unit B 1981) (Henry I), vacated and remanded, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), judgment reinstated, 686 F.2d 311 (5th Cir. Unit B 1982) (Henry II), vacated and remanded, ___ U.S. ___, 103 S.Ct. 3566, 77 L.Ed.2d 1407 (1983), prior judgment reversed, 721 F.2d 990 (5th Cir. Unit B 1983) (Henry III). A review of these cases

and of the Supreme Court's decision in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), leads us to the conclusion that any reliance by the trial judge on Alvord's propensity to commit violent crimes in the future does not constitute constitutional error.

Alvord's first argument (raised in his brief before the Supreme Court decided Goode) is that Proffitt requires this court to invalidate his sentence.[2] Proffitt, 685 F.2d at 1260-69, would seem to mandate such a result. The Supreme

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[2] We realize that the Supreme Court denied certiorari in Proffitt, see ___ U.S. ___, 104 S.Ct. 508, 78 L.Ed.2d 697; however, the denial of certiorari has no precedential effect. In Proffitt, we found other constitutional inadequacies in the sentencing hearing. See 685 F.2d at 1251-1265 (confrontation clause violation; Godfrey v. Georgia invalid statutory aggravating factor). The Court's decision in Goode obviously does not invalidate our holding in Proffitt as to the effect of the confrontation clause.

Court's decisions in Goode and Barclay, however, invalidate the reasoning relevant to our decision in this case set forth in that opinion.[3] In Goode, the Supreme Court gave three alternative reasons for its reversal of our decision. First, stated the Court, if reliance on a nonstatutory factor presents a question of law, we should not have displaced the Florida Supreme Court's resolution of an issue of state law. ___ U.S. at ___, 104 S.Ct. at 382. Second, if the reliance presents an issue of fact, we failed adequately to defer to a state finding of fact under 28 U.S.C. § 2254(d) (1976). Id. at 104 S.Ct. at 382. Third, even if the sentencing judge relied on a factor

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[3] Alvord dropped at oral argument (held after that Goode decision) the contention that Proffitt controls here and asserted that this case is distinguishable from Goode for the reasons discussed below.

"unavailable to him under state law," this reliance, given the review by the Florida Supreme Court, did not render Goode's sentencing unconstitutional. Id. The Court noted that there "is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness." Id.

We see no possible distinctions indicating that Proffitt, not Goode, would control this case. The existence of mitigating circumstances no longer is of importance. We relied on their existence in Goode and concluded that it was not a case, as was Barclay or Ford v. Strickland, 696 F 2d 804, 815, 820 (11th Cir.1983) (en banc), in which the Florida "harmless error" rule applied. In both Barclay and Ford, no mitigating

circumstances were found; however, in Goode, as in this case, substantial mitigating factors (here, inability to conform to the requirements of the law and extreme mental disturbance) were present. The Supreme Court invalidated that distinction.[4]

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[4] The Supreme Court indicated in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), that although the presence of mitigating circumstances might be constitutionally significant, the issue was not before them in that case. The Court stated:

> Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

Id. 103 S.Ct. at 2750. In Barclay, the Court noted that no mitigating factors were found by the judge although some

In the final analysis, the Supreme Court in Goode held that if the state supreme court approves a conviction and death sentence despite reliance on evidence of, or findings of, nonstatutory circumstances, a federal habeas court cannot grant relief unless the evidence or factor in question was constitutionally inappropriate. See also Zant v. Stephens, 103 S.Ct at 2748-49; Barclay, 103 S.Ct. at 3434 35 (Stevens, J., concurring). There is no basis for finding unconstitutional the nonstatutory factor at issue here; indeed, the factor—future dangerousness—is the same factor relied on in Goode. And we find no distinction between the review and approval of the death sentence by the

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existed. 103 S.Ct. at 3435-36 (Stevens, J., concurring). In Goode, the Court thus extended its holding in Barclay to cover cases in which the trial judge finds mitigating factors to exist.

Florida Court in this case and the review and approval in Goode. Compare Alvord v. State, 322 So.2d 533 (Fla. 1975) with Goode v. State, 365 So.2d 381 (Fla.1978). Although the Florida Court approved the death sentence in Alvord without mention of the trial judge's reliance on the nonstatutory factor, the same was true in Goode, and the Supreme Court approved that procedure.[5]

Henry III and our above analysis of the Goode decision invalidate the remaining distinctions raised by Alvord at oral argument. He contends that the evidence of dangerousness in this case was not properly admissible and that the failure of the Florida Court to follow its

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[5] As we noted in Henry III, 721 F.2d at 994-995, the failure of the Florida Supreme Court affirmatively to pass on an issue apparently does not lessen the deference required by Barclay and, now, by Goode.

statutes violates the due process clause. In Goode, the Court invalidates the latter argument: in both this case and in Goode the Florida Court followed exactly the same procedure. As to the former argument, both Goode and Henry III, 721 F.2d at 994, indicate that admissibility of evidence, absent constitutional infirmity, is a question of state law. The evidence here was relevant to Alvord's character, which is a proper subject of inquiry at a sentencing hearing. See, e.g., Barclay, 103 S.Ct. at 3434-35 (Stevens, J., concurring). Finding no distinctions of significance between this case and Goode, we reverse the order of the district court granting the writ because of the trial judge's reliance on the nonstatutory factor.

II. EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

On cross-appeal, Alvord first argues that the district court erred in deciding that he received effective assistance of counsel at trial and that his counsel's assistance at his sentencing hearing, although ineffective, did not prejudice him. He contends that his trial counsel, Mr. Meyers, failed adequately to investigate the possibility of an insanity defense at trial and committed a clearly prejudicial mistake in failing to raise such a defense. He also contends that Meyers failed to unearth and present evidence at the sentencing hearing demonstrating his lack of ability to conform his conduct to the requirements of the law. We conclude that the district court properly resolved both issues

against Alvord.[6]

The record demonstrates that Alvord has a long history of mental illness. He first entered a mental hospital at age thirteen. In 1967, he was charged with the rape and murder of a ten year old girl in Michigan; after spending two years in an institution, he was declared competent to stand trial on the charge but was found not guilty by reason of insanity. Alvord committed the three murders for which he received the death sentence after escaping from the Ionia State Hospital in Michigan.

Meyers was appointed counsel for Alvord shortly after Alvord was indicted in 1973. Alvord refused to talk with Meyers; however, Meyers learned from the prosecutor that Alvord had been

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[6] The district court held an evidentiary hearing on this claim; Alvord does not challenge the adequacy of the hearing.

adjudicated not guilty by reason of insanity in Michigan. Meyers therefore moved for a mental examination of Alvord, and the trial judge directed two court-appointed psychiatrists, Drs. Sprehe and Gonzales, to conduct the examination. Alvord refused to talk with the psychiatrists without his attorney present, and the psychiatrists could give no opinion as to Alvord's mental state. The trial judge therefore committed Alvord to a state hospital for observation. The judge later rescinded this order, however, because he doubted his authority to issue it,[7] and the state instead invited Dr. Robey, a psychiatrist who had worked with Alvord in Michigan, to come and conduct an

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[7] Meyers did not learn until several weeks had passed that Alvord had not been committed; he then moved several times to have Alvord recommitted.

examination.[8]

Alvord talked with Dr. Robey, and Robey testified at a pretrial hearing held by the court that Alvord was competent to stand trial. See infra § IV (setting forth Robey's testimony). Robey again examined Alvord after the hearing and concluded that Alvord was both competent to stand trial and sane at the time he committed the offense. (Apparently the illness suffered by Alvord is a type that can suddenly recur or go into long

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[8] Alvord contends that the trial judge issued these orders on his own motion or at the suggestion of the prosecutor. From examining the record, however, we concluded that Meyers made numerous motions; for example, the state contended at a speedy trial hearing that delays in the trial were caused by Meyers' numerous motions to have Alvord examined or committed or both. Meyers and the trial judge clearly accepted these statements by the prosecutor as true. Thus, Alvord's present contention that Meyers virtually ignored him before the trial is contradicted by these portions of the record.

remissions.) The court ordered that Sprehe and Gonzales again attempt to examine Alvord; at another competency hearing, Sprehe testified that Alvord was competent to stand trial, but qualified his opinion because Alvord was still uncooperative. Gonzales, because of Alvord's lack of cooperation, could form no opinion. Relying on the testimony of Robey and Sprehe, the court ruled Alvord competent to stand trial.[9]

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[9] Alvord asserts that the trial court's reliance on Robey's testimony was improper. Although we will more fully address this contention in a later section of our opinion, see infra §IV, we pause now to note the unique role played by Dr. Robey in these proceedings. The trial judge made every effort to ensure that Alvord received a fair and adequate examination. Both Alvord's attorney and the prosecutor wanted a mental examination of Alvord to be conducted; however, Alvord repeatedly refused to talk to the court-appointed psychiatrist. Therefore, at state expense, the trial judge requested Dr. Robey to fly in from Michigan to examine Alvord. Robey had been primarily responsible for Alvord's treatment while

Nevertheless, a few weeks before trial, the court ordered Sprehe and Gonzales again to examine Alvord. Sprehe again testified, after the examination, that Alvord was competent; Gonzales again could not form an opinion. Neither doctor could testify as to Alvord's sanity at the time of the offense. Although Meyers

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he was a patient in Michigan; and, as Robey testified at trial, he knew Alvord better than any other doctor. See infra §IV (quoting from transcript).

Robey's knowledge of Alvord's history and illness placed him in a uniquely qualified position to perform the needed examination. Furthermore, he was a psychiatrist with whom Alvord was willing to talk and by whom Alvord would consent to be examined. The trial judge could well have concluded that if one of the numerous psychiatrists in Florida could not examine Alvord, calling in a psychiatrist from Michigan would be a waste of resources. He did not so conclude, and we commend the judge for responding to the problems presented by Alvord's refusal to talk to court-appointed doctors by adopting the logical solution of obtaining, at obvious expense, the doctor most qualified to render an opinion.

asserted that the Michigan conviction constituted prima facie evidence of incompetency, the trial judge, noting that Meyers had produced no documentary evidence of that judgment, again pronounced Alvord competent to stand trial. Before trial, Meyers moved unsuccessfully for Alvord to be committed for observation and filed a notice of intent to plead insanity, attaching a copy of Alvord's previous acquittal on the basis of insanity, which is now inexplicably absent from the state trial record.[10]

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[10] The district court found (as an historical fact) that Meyers filed this notice, and it has now been added to our record on appeal.

A. *Meyers' Assistance at the Guilt-Innocence Phase.*

Meyers conducted no independent investigation into Alvord's history of mental illness. He did not contact doctors, other than Robey, at the Michigan hospital at which Alvord spent a considerable amount of time, nor did he obtain any except a small portion of Alvord's medical record. He did not raise at trial the presumption of insanity afforded Alvord under Florida law by reason of his prior adjudication of insanity, the effect of which is to place the burden on the prosecution to prove sanity beyond a reasonable doubt. See Parkin v. State, 238 So.2d 817 (Fla.1970); Livingstoll v. State, 383 So.2d 947 (Fla. App.1980); Hixon v. State, 165 So.2d 436 (Fla. App.1964). Alvord contends that these actions and inactions constitute

ineffective assistance.

In response to Alvord's contentions, the state argues that Meyers properly failed to investigate the possibility of raising the insanity defense because Alvord refused to allow that defense and properly failed to raise the defense because Alvord insisted on relying on an admittedly weak, unsupported alibi."[11] Meyers testified at the evidentiary hearing that Alvord's lack of cooperation caused him to abandon the insanity defense; given Robey's opinion that Alvord was sane at the time of the offense, Meyers did not think it would be successful without Alvord's cooperation.

The question we must decide is whether, under the circumstances, Meyers' decisions and actions constituted

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[11] The evidence produced a trial of Alvord's guilt was overwhelming.

reasonably effective assistance. See Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). It is now axiomatic that the petitioner must prove his counsel ineffective by a preponderance of the evidence. Id. at 1250. It is also axiomatic that counsel has a duty to conduct a reasonable investigation under the circumstances. Id. at 1251-58. The issue presented in this case, however, is slightly different than the issue in Washington v. Strickland and in many other cases: here, the defendant, Alvord, did not want and affirmatively sought to prevent his trial attorney from asserting the insanity defense that he now claims his attorney, as a matter of constitutional law, should have raised. Thus, this is not the same case as several

cited by Alvord in which the defendant was willing to assert the defense but his attorney's inadequacy prevented him from doing so successfully. See Beavers v. Balkcom, 636 F.2d 114 (5th Cir. Unit B 1981); Davis v. Alabama, 596 F.2d 1214 (5th Cir.1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); United States v. Fessel, 531 F.2d 1275 (5th Cir.1976).

We conclude that in this case the assistance rendered by Meyers met the requirements of the Constitution. See, e.g., Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir.1981) ("effectiveness may not be assessed through the finely ground lenses of 20/20 hindsight"). Here, the state provided three psychiatrists to interview Alvord, and he would only communicate with Robey. Robey, who indicated that he was more familiar with

Alvord than any other psychiatrist, testified that Alvord was both sane and competent to stand trial. See infra § IV (setting forth testimony from transcript). After repeated and conscientious attempts to have doctors communicate better with Alvord, the trial judge ruled Alvord competent. Meyers repeatedly advised Alvord to assert the insanity defense, but Alvord refused to do so. Meyers therefore did not assert the defense but argued that Alvord's incapacity weighed against imposition of the death penalty.

In light of Alvord's refusal to assert the insanity defense, although earnestly counseled by his defense attorney to do so, we conclude that Meyers rendered competent assistance. Further research into Alvord's background would have been fruitless because Alvord would not allow Meyers to produce evidence of

insanity. The trial judge held Alvord competent—on the unrebutted advice of two psychiatrists—and the only psychiatrist able to form an opinion would have testified that Alvord was sane. In addition, given Alvord's competency, Meyers was ethically bound to follow his client's wishes. See Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir.1983). In Foster, the attorney wanted to present a second-degree murder defense based on a depraved-mind theory; the defendant refused to allow that defense, and this court held that the decision of the attorney to follow his client's wishes did not constitute ineffective assistance. Id.

We realize that there may be cases in which the client's faculties are so impaired that the client cannot choose for himself what to do. Alvord argues that this is the problem here and cites Brennan

v. Blankenship, 472 F.Supp. 149, 156 (W.D.Va.1979), aff'd mem., 624 F.2d 1093 (4th Cir.1980); however, we need not comment on the resolution of that case by our sister circuit nor do we need to speculate here on what facts might lead us to conclude that the attorney should ignore his client and pursue some other unspecified course of action. Hopefully, if the client cannot adequately help prepare his defense, the trial judge will rule him incompetent to stand trial. Here both psychiatrists testified to Alvord's competency, and Meyers made a reasonable effort to convince the judge to rule Alvord incompetent.[12] Given this

[12] We have read the record of all the pretrial proceedings in this case. We are convinced that Meyers rendered effective assistance; he argued for Alvord's commitment; he moved for a declaration of incompetency; he cross-examined the expert witnesses. Meyers cannot be faulted simply because he did not succeed.

determination, Meyers adopted a reasonable course of action under the circumstances.

B. *Effective Assistance at the Sentencing Hearing.*

Alvord contends that Meyers failed to provide effective assistance at his sentencing hearing because he failed to collect and present as mitigating evidence Alvord's extensive history of mental illness; failed effectively to cross-examine Robey, who testified for the state, because of Meyers' unfamiliarity with Alvord's background; failed to produce other psychiatrists as "rebuttal witnesses"; and failed to produce witnesses to testify favorably regarding Alvord's character. The record demonstrates that Meyers called no witnesses at the sentencing hearing; however, Meyers testified before the district court that, had the state not

called Robey, he would have called him because Robey would testify to the existence of the two mitigating circumstances found by the jury and judge. The district court stated that it was "prepared to conclude that" Meyers rendered ineffective assistance because of his failure adequately to investigate Alvord's background; however, the court denied the writ on this issue because it found that Alvord suffered no prejudice. We also conclude that Alvord suffered no prejudice; we therefore need not decide whether Meyers' assistance was ineffective.[13] See Washington, 693 F.2d

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[13] Alvord raises one other claim: he contends that Meyers' closing argument was constitutionally ineffective under King v. Strickland, 714 F.2d 1481 (11th Cir. 1983). Meyers' closing argument in this case does not remotely resemble the argument in King. In King, the counsel "separated himself from his client" and "may have done more harm than good." Id. at 1491. Meyers, however, made a lengthy

at 1264 n. 33 (no need to address ineffectiveness if no prejudice).

At the sentencing hearing, Robey testified to the existence of the two mitigating circumstances found in this case He stated that Alvord had been previously adjudicated insane and asserted strongly that Alvord's mental illness was not of the type that Alvord could not be rehabilitated. The state called Robey, so Alvord cannot blame Meyers for any testimony by Robey that he now considers damaging.[14] As the district judge noted,

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argument describing the horrible circumstances of an execution and Alvord's inability to conform his conduct to society's dictates; he also noted that the judge could put Alvord in jail for life, thus rebutting any argument that Alvord could kill again. Given the overwhelming proof of Alvord's guilt, Meyers clearly rendered constitutionally effective assistance.

[14] Alvord contends that parts of Robey's testimony were not admissible. Alvord's contention, which we have

Alvord offered at neither the state nor the federal habeas evidentiary hearings evidence that Meyers could have produced had he conducted an investigation and called other witnesses; he also did not explain how Meyers could more effectively have cross-examined Robey. Alvord has called our attention to no evidence that Meyers should have produced at the sentencing hearing but did not; Alvord has not, therefore, carried his burden of establishing prejudice.[15]

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rejected above, is without merit. See supra §I (Goode decision requires deference to state evidentiary law; no constitutionally inadmissible evidence in this case).

[15] Alvord asserts in his brief that Meyers should have called witnesses in order to "humanize" Alvord in the eyes of the jury. The district court did not pass on the issue of whether Meyers' assistance was effective; however, the court indicated that it was prepared to find the assistance ineffective. We also do not pass on this issue; however, we note that the failure to attempt to "humanize"

Alvord contends that he deserves a new sentencing hearing despite our conclusion that he has not been prejudiced because in this case the "ineffectiveness of counsel is so pervasive that a particularized inquiry into prejudice would be 'ungrounded speculation.'" Washington, 693 F.2d at 1259 n. 26 (quoting United States v. Porterffield, 624 F.2d 122, 125 (10th Cir. 1980)). We are mindful that actual prejudice need not

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Alvord may well have been the most reasonable choice under the circumstances. It is not good trial tactics to attempt to persuade a jury of the verity of a proposition when it is manifestly impossible to do so. Alvord had committed three violent murders and had an extensive history of past criminal activity. He was not, to say the least, the boy next door who had never before show a propensity to commit crime. Meyers reasonably chose to rely primarily on the statutory mitigating circumstance that Alvord could not conform his conduct to the requirements of the law and argue to the jury that incarcerating Alvord would be sufficient specially to deter him from committing future crimes.

be demonstrated in some cases. See Holloway v. Arkansas, 435 U.S. 475, 98 S Ct. 1173, 55 L.Ed 2d 426 (1978) (state improperly requires single attorney to represent multiple defendants at same trial); Adams v. Balkcom, 688 F.2d 734, 739 n 1 (11th Cir.1982) (representation "functionally equivalent i n every respect to having no representation at all"). We recognized in Washington v. Strickland that prejudice need not always be demonstrated, 693 F.2d at 1259; however, Washington clearly implies that prejudice must be shown in this case. In both this case and Washington, the alleged inadequacy stems from a failure adequately to investigate, and we required the petitioners to show prejudice in Washington. We sit as a habeas corpus tribunal to grant relief to persons harmed because their constitutional rights have

been violated. In some cases, we will infer harm because, although it is difficult or impossible to prove, the circumstances of the petitioner's conviction are inherently prejudicial. In some cases, the harm is so obvious it would be a waste of resources to prove it. This case presents neither situation; the district court correctly held that Alvord must prove prejudice to obtain the writ.

III. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Alvord next contends that his appellate counsel rendered ineffective assistance. He sets forth five issues that his appellate counsel did not raise issues that, according to Alvord, would have persuaded the Florida Supreme Court to overturn his conviction. Although we address claims of ineffective assistance

of counsel on appeal much less frequently than claims of ineffective assistance at trial, it is well established that a defendant has the right to effective counsel on appeal. See Anders v. California, 386 U.S. 738, 741-42, 744, 87 S.Ct. 1396, 1398-99, 1400, 18 L.Ed.2d 493 (1966) (counsel must function as advocate on behalf of client). In order to prevail, Alvord must prove that he did not receive "'reasonably effective representation,'" Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982) (citing previous cases), cert. denied, U.S., 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); however, counsel need not provide perfect assistance, id. From the reported cases, it appears that counsel's failure to file a brief is in most cases ineffective, see Arders; Mylar; however, counsel's failure to advance errors on appeal later gaining "judicial

recognition" does not constitute unconstitutional aid, Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), and counsel need not brief issues reasonably considered to be without merit, Mendiola v. Estelle, 635 F.2d 487, 491 (5th Cir. Unit A 1981); Hooks v. Roberts, 480 F.2d 1196, 1197-98 (5th Cir. 1973), cert. denied, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). Alvord contends that the issues not raised by his counsel were of substantial merit. As we stated in Hooks, the best way to evaluate "this question . . . is to examine the alleged trial errors to see if they contain sufficient merit . . . that his appellate counsel can be faulted for not having raised them." 480 F.2d at 1197.

A. *Failure of Trial Judge Sua Sponte to Give Insanity Instruction.*

Alvord argues that his appellate counsel should have asserted as error the failure of the trial judge sua sponte to charge the jury that, because of his prior judgment of not guilty by reason of insanity, he was presumed insane until proven sane. We find ourselves in a rather unusual posture in this case. On the one hand, the issue of ineffective assistance—even when based on the failure of counsel to raise a state law claim—is one of constitutional dimension, see Hooks, 480 F.2d at 1197, and, as a mixed question of fact and law, the presumption of correctness under 28 U.S.C. § 2254(d) does not apply to this type of claim, see, e.g., Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980). On the other hand, the

validity of the claim that Alvord's appellate counsel failed to assert is clearly a question of state law, and we must defer to the state's construction of its own law. Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 382, 78 L.Ed.2d 187 (1983). In this instance, Alvord raised the present claim before the Florida courts on collateral attack of his conviction; and, in Alvord v. State, 396 So.2d 184, 191 (Fla.1981), the Florida Supreme Court expressly rejected it as without merit.

Although a bewildering mixture of issues both subject to and not subject to a presumption of correctness face us in this case, we believe the proper method of analysis is to accord deference to the Florida Supreme Court's decision to the extent it decides the validity of Alvord's underlying state law claims while

reserving for de novo consideration the ultimate issue of whether Alvord received constitutionally effective assistance. Following this analysis, it is clear from Alvord v. State that the Florida Court held that, as a matter of state law, the trial judge need not have instructed the jury sua sponte on the presumption of insanity. Quoting the trial court, the Florida Supreme Court stated:

> This ground for post conviction relief is also without merit. No proof of the Defendant's prior adjudication of insanity had ever been submitted to the Court and no such defense was raised. A Defendant has the burden of establishing a plea of insanity by showing that he was legally insane when he committed the criminal act. Hixon v. State, (D.C.A.1964) 165 So.2d, 436. The trial court is only required to instruct the jury on issues properly raised. Since the Defense did not choose to assert the defense of insanity, it would have been improper for the trial Court to have instructed the jury on that issue.

396 So.2d at 190 91. It thus seems clear that the trial judge, as a matter of state law, need not have given an instruction that was never requested.[16] Indeed, this conclusion is the only reasonable one under the circumstances—with or without the Florida Supreme Court's decision to aid us. Given the invalidity of the claim that Alvord contends should have been asserted, we conclude that, under Hooks and Mendiola, Alvord has failed to demonstrate with respect to this issue that his counsel rendered ineffective assistance.

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[16] We realize that the state court's assumption that Meyers never submitted the prior adjudication of insanity at trial has now been demonstrated to be erroneous. See supra note 10 and accompanying text. This does not alter our conclusion that the ground not asserted on appeal lacked merit. Meyers did not plead insanity at trial; and it seems clear from the state court's opinion that the judge need not instruct on an issue not raised.

B. *Failure of Trial Court to Grant Alvord's Pro Se Motion to Remove Public Defender as Counsel.*

At trial, Alvord requested the Judge to remove his appointed counsel, Mr. Meyers, because he did not trust Meyers to represent him. The trial judge indicated that he would consider the motion and instructed Meyers to file a formal, written motion should Alvord so desire. The trial judge did not remove Meyers from the case, however; and Alvord now contends that his appellate counsel should have asserted that the trial judge erred by not appointing a different counsel. Noting that the state collateral review court found as a matter of historical fact that Alvord "ultimately consented to being represented by ... Meyers," the district court held that finding to be fairly supported by the record, see 28 U.S.C. § 2254(d), and concluded that reasonable

counsel could have decided not to raise the issue on appeal, citing United States v. Young, 482 F.2d 993 (5th Cir.1973).

Alvord first argues that the district court erroneously treated the state court's finding on the consent issue as a question of historical fact instead of a mixed question of law and fact, which is afforded no presumption of correctness under section 2254. Alvord cites only Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), as support for this contention. We do not find Cuyler controlling here. In Cuyler the Court held that whether an attorney represented more than one defendant at trial is a mixed question and not entitled to a presumption of correctness. Id. at 341-42,100 S.Ct. at 1714-15. Whether Alvord decided to accept Meyers as his counsel is clearly a question of

historical fact. See Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed 2d 770 (1963). Unlike the issue in Cuyler, the inquiry here does not go directly to the effectiveness of the defendant's counsel or the prejudice caused by the representation afforded by the state. Thus, the district court properly afforded deference to the state court's finding on this issue.[17]

We must, of course, decide without employing a presumption of correctness whether Alvord's appellate counsel was ineffective in failing to raise the present issue. The finding that Alvord accepted his trial counsel certainly supports his appellate counsel's decision not to raise the point. In addition, the record demonstrates that the trial judge

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[17] Alvord does not content that he did not receive a full and fair hearing.

had every reason to believe that Meyers and Alvord had resolved their differences from Meyers' statements to that effect at the trial. See Brown v. Wainwright, 665 F.2d 607, 612 (5th Cir.1982) (en banc) (trial judge may accept counsel's statements and need not interrogate defendant independently). Given these underlying facts, we conclude that Alvord's counsel acted reasonably by not raising this claim on appeal.

C. *Examination of Alvord by Dr. Robey.*

As we have related above during our discussion of the events leading up to Alvord's trial, see supra § II, Dr. Robey examined Alvord, at the request of the trial judge, to determine his competency to stand trial. During the sentencing hearing, Dr. Robey testified for the state; although he based his testimony in

part on his previous knowledge of Alvord, he also relied on the pretrial interviews. Alvord contends that the trial judge should not have allowed Robey to testify at the sentencing hearing under the rule stated in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). The issue before us is whether his counsel's failure to raise this issue on appeal constituted ineffective assistance.

The issue is not without difficulty. The predecessor to this court, in an opinion binding on us,[18] held that Estelle v. Smith applies retroactively. See Battie v. Estelle, 655 F.2d 692, 696-99 (5th Cir.1981). Nevertheless, the present fifth circuit apparently has held (in a non-binding opinion) that failure of counsel to anticipate Estelle v. Smith and

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[18] See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

timely enter an objection does not constitute ineffective assistance of counsel. See Gray v. Lucas, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3099, 77 L.Ed.2d 1357 (1983). This holding is in accord with the rule stated in Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir.), cert. denied, ___ U.S.___, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), that counsel need not anticipate new developments in the law.

We need not rely only on the principle stated in Sullivan, however. As the district judge aptly noted:

> Several aspects of this case also indicate that Mr. Seymour cannot be faulted for not raising a Smith point on appeal. First, trial counsel failed to object to Dr. Robey's arguably Smith-violative testimony that petitioner would be dangerous to women in the future and that he was sane at the time of the Florida crimes. Trial Rec. at

1171-72, 1178-79. Second, and more fundamentally, the Smith issue would not necessarily have succeeded on appeal. In Smith the psychiatrist who examined the accused, Dr. Grigson, testified on the basis of that examination alone. Thus, there was no question that his conclusions on future dangerousness were based on statements made during a custodial examination without prior Miranda warnings or notice to counsel. Mr. Seymour faced quite a different circumstance: Dr. Robey had supervised Alvord's treatment for years prior to his escape in Michigan, and his contemporaneous examination of Alvord was in two sessions, the latter of which—on the specific question of petitioner's sanity at the time of the offense—was apparently in substantial compliance with the dictates in Smith. His testimony was therefore not based entirely, and may not have been based at all, on the first custodial examination. Finally, the record indicates unequivocally that Mr. Meyers was eager for Dr. Robey to examine his client. Meyers Depo. at 31.

564 F.Supp. at 481 482 (footnotes omitted). Given these factors, the rule in

Sullivan, and the fifth circuit's holding in Gray, we conclude that Alvord's appellate counsel rendered reasonably effective assistance even though he failed to raise this issue.

D. *Testimony by Robey in Violation of Fla.Stat.Ann. §§ 90.242 & 921.141.*

At the sentencing hearing, Robey testified that Alvord had previously committed two misdemeanors in Michigan and that he had committed kidnapping and rape for which he had been found not guilty by reason of insanity. Robey stated that he did not believe Alvord to have been insane when he committed the rape and kidnapping, however. Alvord argues that this testimony was not properly admissible under the Florida capital sentencing statute, Fla. Stat. § 921.141, because it does not tend to prove the presence or absence of the

specified aggravating and mitigating circumstances. He also contends that it was admitted in violation of the psychiatrist-patient privilege then codified by Fla.Stat § 90.242. He urges this court to conclude that his counsel's failure to raise these issues on appeal constituted ineffective assistance.

We begin our analysis by noting that Alvord's attorney raised a similar issue on appeal: he contended that Robey's testimony concerning the Michigan felonies was inadmissible under Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The Florida Supreme Court rejected this claim. Alvord v. State, 322 So.2d 533, 539 (Fla.1975). Given the Florida Court's statement in that case that a wide open rule of admissibility applies at penalty hearings, id., we think it reasonable for Alvord's counsel not to

have asserted the grounds now set forth as limiting the admissibility of Robey's testimony. The testimony clearly bears on the presence or absence of prior criminal activity, Fla.Stat. § 921.141(6)(a), and the capacity of Alvord to conform his conduct to the requirements of the law, id., § 921.141(6)(f).

In addition, Alvord's counsel was reasonable in not asserting the psychiatrist-patient privilege. As the district court stated:

> The short answer is that the trial court took considerable care to ensure that Dr. Robey testified only to matters surrounding the Michigan crimes of which he had knowledge independent of communications from Alvord. Next, petitioner cites Parkin v. State, 238 So.2d 817, 818 (Fla. 1970) as grounding a possible argument on appeal. Parkin, decided over a decade before Smith, held that the fifth amendment rights of a criminal defendant who chooses to plead insanity were not violated when she was ordered by

> the trial court - to cooperate with court-appointed psychiatrists. The court limited the use of such testimony: [A]ny statements obtained from the patient by the doctor are used as evidence of mental condition only, and not as evidence of the factual truth which may be contained in them." Id. at 822. The answers to petitioner's contention that Mr. Seymour should have raised Parkin are twofold: first the record reflects again the care of the trial judge in limiting Dr. Robey's testimony on the Michigan crimes to facts he knew from sources other than Alvord's statements; and second, Dr. Robey certainly did not come to know of Alvord's criminal record in the course of the custodial examination he made in January 1974, and Parkin's limitations therefore would not apply. Thus, the decision not to raise these matters on appeal was a reasonable tactic.

This reasoning well supports the district court's conclusion that Alvord received effective assistance of counsel on

appeal.[19]

IV. ADEQUACY OF PSYCHIATRIC HEARING BEFORE TRIAL

Alvord contends that he did not receive due process of law at his trial because the competency hearings conducted by Dr. Robey, Dr. Gonzales, and Dr. Sprehe were insufficient to allow the trial judge accurately to rule on his competency to stand trial. Alvord relies on United States v. Taylor, 437 F.2d 371 (4th Cir.1970), and Blake v. Zant, 513 F.Supp. 772 (S.D.Ga 1981) (appeal docketed 5/13/81), and calls our attention to Judge

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[19] Alvord raises one other issue dealing with his counsel's alleged inadequacies. He contends that his counsel should have argued on appeal that he received an adequate psychiatric examination. As we conclude in the next section of this opinion, Alvord received a proper examination and hearing. See infra §IV. Thus, his counsel cannot be faulted for failing to raise this claim.

Sobeloff's opinion in Taylor discussing critically the competency examination in that case, see 437 F.2d at 379-83. It is now well established that conviction of a legally incompetent defendant violates due process. Pate v. Robinson, 383 U.S. 375, 386, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966); Reese v. Wainwright, 600 F.2d 1085, 1090-94 (5th Cir.), cert. denied, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979). Stated in another way, the state must have held "an adequate hearing on [Alvord's] competency," Pate, 383 U.S. at 386, 86 S.Ct. at 842, or we must hold Alvord's conviction invalid. The district court properly refused to invalidate the conviction because an examination of the record shows that the state afforded Alvord an adequate hearing.

We need not repeat here the rather detailed account of the pretrial

proceedings related to Alvord's competency set forth above. See supra § II. To summarize the events, the trial judge several times ordered two psychiatrists to examine Alvord, but they were unable at first to form an opinion because of Alvord's failure to cooperate. The judge then ordered that Alvord be sent to the state mental hospital for observation, but he rescinded that order because he believed he lacked the necessary authority to enter it Tn order to obtain a meaningful examination and opinion, the court invited Dr. Robey to come to Florida from Michigan to examine Alvord at state expense. Robey talked twice with Alvord; and, primarily on the basis of Robey's diagnosis, the judge found Alvord competent

Alvord argues that the examination he received was grossly inadequate because of

the poor conditions and lack of time spent together by Robey and Alvord. Robey testified to this effect at the district court's evidentiary hearing. Supp. Appellate Rec. II, 21-24. We find no indication that Robey believed at the time he conducted his examination that he was operating under unacceptable conditions, however. The record shows that Robey submitted the following report to the trial judge:

> The above-named 26-11[?] year old white, married Catholic male was interviewed on two separate occasions at the Hillsborough County jail in Tampa, Florida. This evaluation was made at the request of the State Attorney following the defendant's refusal at an earlier date to in any way cooperate with the court appointed examining psychiatrists, Doctors Arturo G. Gonzales and Daniel J. Sprehe.
>
> The defendant in the present case is charged with three counts of first degree murder. He had previously been acquitted by Reason of Insanity in the

State of Michigan, and had been committed at the Ionia State Hospital, Michigan's equivalent of Chattahoochee State Hospital in Florida He had escaped from this institution on January 24, 1973, and had traveled to Florida. It was while on escape from Ionia State Hospital that he is alleged to have committed the three murders with which he presently stands charged.

The defendant was interviewed on two separate occasions. On the first of these interviews, on January 3, 1974, he was seen from 1:45 to 4:40 p.m. with one ten-minute break for the interviewer to answer a telephone call. Interview time on this date totaled two hours and forty five minutes. During this initial interview, evaluation was done of the defendant's competency to stand trial, but due to his refusal to discuss any of the details of the acts with which he was charged, no opinion could be rendered on criminal responsibility except one generally based on prior knowledge of the defendant in comparison with the mental state as seen during the interview. On the basis of this interview, an opinion was rendered in Court that the defendant was fully capable of recognizing the nature and object of the

proceedings, his own position in those proceedings as defendant, the nature and extent of the charges against him, and the possible penalties, and he was felt to be fully capable, insofar as he wished, to advise and cooperate with counsel in both the preparation and implementation of his defense. The defendant did make a statement both on interview, and subsequent thereto on January 4 before the Court, that he had less than complete faith in his assigned counsel and demonstrated this by comparison with the lawyer who had been assigned to him in Michigan on the question of his extradition to Florida. This very fact itself was indicative of competency to stand trial.

In regard to the question of criminal responsibility, as indicated above, the defendant initially would not discuss the situation. It was only after being reassured from the Bench by the Judge that any inculpatory statements he might make to the psychiatrist could not be used in the case in chief, that he then expressed willingness to discuss the matter.

On January 4,1974, the defendant was seen again from 6:45 to 9:00 p.m. on the issue

> of criminal responsibility. Based on this two and one-quarter hour interview, an opinion is rendered that in reference to the act charged, the defendant was aware of the wrongfulness of his actions. Despite this, paranoid and schizoid features are seen in the underlying basic immature sociopathic personality disorder, and were an A.L.I. Model Penal Code test used in the State of Florida, there could conceivably be some argument that, by reason of mental disease, he lacked substantial capacity to conform his behavior to the requirements of the law.
>
> In summary, an opinion is rendered that the defendant, Gary Alvord, is both competent to stand trial and criminally responsible under Florida law.

At one of the numerous pretrial hearings, Robey made the following statements concerning the adequacy and results of his examinations:

> Q. And throughout this interview with and examination of the defendant, Gary Alvord, were you able to form an opinion as to whether or not he would be able to aid and assist his

counsel in the preparation and presentation of his defense?

A. Yes, sir, I think, I have some qualifications in this area, but the qualifications are more concerned with the fact that he has been aware of comparisons or has made comparisons between the assistance he obtained from counsel here and the assistance he obtained, for instance, from counsel in Michigan at the time of his extradition. This showed me, of course, that while he might be concerned about the expertise that would be applied legally to his case, that any reluctance to cooperate would be just that. It would not be in any way based on mental illness. It would be based in the hope for the maximum representation he could receive.

Q. Are you saying that he was concerned that he was not going to get full legal protection here as opposed perhaps to the attorney he had in Michigan?

A. That is correct.

Q. Is that what you are saying?

A. Yes.

Q. So, it didn't have anything to do with any mental illness that he might not be able to—

A. No, sir.

Q. -aid and assist his counsel?

A. This, this was based in what I feel was entirely, logical, reasonable concern, particularly in view both of capital punishment being reinstituted in this state and the realization of the severity of the offense with which he is charged. And it indicated to me not that he was incompetent but that his abilities to thoroughly evaluate the legal situation were, as I indicated before, perhaps above average.

Q. Okay. So, as to his ability to aid and assist counsel, there is no, in your opinion, there is no mental illness or disease that would prevent or preclude him from aiding and assisting his counsel?

A. That is correct.

Q. Okay. Now, was he able to understand the charges pending against him in this case, three

counts of murder in the first degree?

A. Yes.

Q. And that is your opinion regarding that?

A. That's correct.

Q. Okay, No qualifications regarding it?

A. No, sir.

Q. As to his understanding of the charges?

A. All of these are within the bounds of reasonable medical certainty.

Q. Okay, Doctor, your opinion at this point would be that Gary Alvord is competent to stand trial?

A. That's correct.

Q. Okay. Thank you.

In response to questions by Meyers on cross-examination, Robey stated:

Q. Were you able to adequately make a determination on January the 18, 1973?

A. Of what, Mr. Meyers?

Q. Of his mental condition?

A. Oh, yes, sir. I think once you have obtained an adequate past history and get to know someone well, as little a period of time as thirty seconds to a minute can give us more than

adequate diagnostic information, again based on the fact that you already know the defendant, the patient, well.

* * *

A. Well, Mr. Meyers, I think I could give you many examples, both actual and certainly hypothetical ones that might be of greater assistance to the Court, where psychiatric diagnoses can be made in as little as five to ten seconds, if the symptoms are sufficiently overt But as I indicated previously in my testimony, when you get to know someone quite well, as I had Gary, a very few minutes will suffice. I am quite sure you yourself can go home at night and perhaps within five seconds know whether you wife is feeling happy, sad or—

Q. I won't argue with you.

Robey also testified that he was the doctor most familiar with Alvord:

Q. So, it's your opinion you know more about him than anybody else who was there?

A. That's correct.

The state trial court also based its findings on the report of Dr. Sprehe, who,

after repeated attempts to examine Alvord, reached the following qualified conclusions:

> Pursuant to your order I again tried to perform a psychiatric examination on Gary Eldon Alvord on 1/8/74. As you know, I tried to interview him on 10/9/73 but at that time he had refused to talk to me, stating that if I was a doctor he didn't want to talk to me even though I tried to explain my position at that time regarding being assigned by the court, etc. to talk to him. He stated that he was aware of his rights and that he didn't need to talk to anybody and therefore I was unable to perform a psychiatric examination.
>
> Since that time I talked to Dr. Ames Robey who was his doctor in Michigan when he was in the State Hospital there and Dr. Robey stated that he thought he had persuaded Mr. Alvord to be willing to talk to me but he wasn't sure, but at any rate that Mr. Alvord certainly understood his legal rights and his legal position and was certainly able to stand trial. This was the opinion of Dr. Robey.
>
> Armed with this information, I

again went to talk to Mr. Alvord on 1/8/74 and he again in a very friendly way refused to talk with me. He denied talking with Dr. Robey and stated that he had just fired his attorney and that he couldn't talk with me without an attorney present and that he had no wish to talk to me anyway and that he knows his rights and that his rights are that he must have an attorney present if he wants one whenever he is being interviewed by anyone. I tried to explain my neutral position and the fact that I am only appointed as an expert witness to examine him but he was unwilling to listen to my explanation and finally walked out of the interview room without further examination being conducted.

It is my definite impression that Mr. Alvord is mentally competent to stand trial and that he is able to understand the nature of the charges against him and that he is able to assist counsel in the preparation of his defense; however, this impression is offered on the basis of my brief meeting with him plus my conversation with his old psychiatrist, Dr. Ames Robey.

It appears from these record excerpts that Alvord received a constitutionally

adequate examination. We are not prepared to hold, as Alvord requests, that the state must commit all defendants to the state mental hospital for observation if they so request. We also are not prepared to invalidate Alvord's conviction because Robey, years after his pretrial examination, has expressed limited qualifications as to his conclusions.[20]

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[20] Robey stated at the district court's hearing:

> Q. Could you please describe to me the physical surroundings that you conducted your examination in?
> A. Well, initially, we just stood in the hall. There was no place to talk and during this period, there was really little could be done.
> After about ten or fifteen minutes, a bail bond cubbyhole became available. We used that for maybe another half hour or so and then finally one of the guards informed us hat a room was available and we stayed in that until eight-until 4:15.
> Q. Based on your medical qualifications in applying good psychiatric practice, do you

have an opinion as to the adequacy of that physical layout when conducting a psychiatric exam to determine competency to stand trial in a triple murder case?
A. Well, I think when you add the caveat that involve a tripe murder case, I would have to state that they are not only bad, they were totally unacceptable, although all that was available.
Q. Applying good psychiatric practice, do you have an opinion as to the adequacy of that particular room to conduct an examination to determine competency to stand trial and sanity at the same time of the offense in a triple murder case?
A. I have such an opinion.
Q. What is that opinion?
A. It is my opinion that, given the seriousness of the charges and given the potential for the death penalty, the facilities were totally inadequate and that there should have been hospitalization.
Q. Now, are you able to tell us whether or not you could have reached an opinion as a result of your examination on January 3 and January 4, but for the fact that you have available to you access to Gary Alvord's medical records?
A. Yes, sir. I feel that

without my prior knowledge of him, I could not have reached an opinion certainly in regard to criminal responsibility. In regard to competency, the major concern I had is that he might show this so-called hyper-competency syndrome of the paranoid individual who knows all the law. He doesn't really know how accurate it is, but he known it all and is very upset about what is going on.
Had I been able to talk to Mr. Meyers, either during or subsequent to my initial evaluation and go back and make another, I suspect I would have been less sure of his competency, but I had more data any anyone else and it made it easier for me, but the situation

even on competence was hardly adequate.

* * *

It is my opinion that while I personally don't hold any great grief for or against the death penalty, it is somehow terrible permanent and I feel it is extremely important in such cases to not only have at least three psychiatrists, but to have the opportunity made available for them to get every last bit of significant data concerning

IV. MIRANDA VIOLATIONS

At trial, the police officer who arrested Alvord in Michigan testified over an objection that, when arrested, Alvord stated, "I'm a rapist, not a ... thief." Alvord contends that the trial court should have excluded this testimony under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because: (1) the officer did not advise Alvord of his right to have appointed counsel; (2) Alvord never signed a written waiver of

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> the patient's whole life history and really, without a hospital setting which will also provide day to day observations, you simply can't do this in a jail setting.
>
> Robey's testimony at the pretrial hearing demonstrates that he entertained no similar reservations then. The state need not anticipate such reservations, not raised at trial, first voiced when the execution of the death sentence becomes imminent.

his rights; and (3) Alvord's statement was involuntary because he lacked the capacity to understand what he was saying, see Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). The district court properly rejected these arguments.

In Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Supreme Court addressed the effect of a warning faulty for the identical reason at issue here—failure to include notice of right to appointed counsel—and held that the omission did not render the statements inadmissible. The Florida Supreme Court affirmed Alvord's conviction on the basis of Michigan v. Tucker, see Alvord v. State, 322 So.2d 533, 537 (Fla.1975); we agree with the Florida Court that this case and Tucker are indistinguishable. It is also clear that the failure of the

officer to obtain a written waiver does not render the statement inadmissible. North Carolina v. Buller, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Finally, we do not find Alvord's reliance on Blackburn v. Alabama persuasive. In that case the defendant was arrested and interrogated; shortly after the interrogation he was adjudicated insane. Four years later he was found competent to stand trial and his confession was admitted against him. 361 U.S. at 200-02, 80 S.Ct. at 276-77. The Supreme Court held that (despite the trial court's finding that the confession was voluntary) the confession should not have been admitted in light of substantial evidence that the defendant was incompetent when he confessed. Id. at 203-05, 80 S.Ct at 278-79. We face here a different situation. The trial judge had

before him substantial evidence of Alvord's competency (and of the voluntary nature of the confession). Under 28 U.S.C. § 2254(d), we must afford the finding of competency a presumption of correctness; and, in this case, nothing appears that upsets this presumption. See generally Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

VI. UNCONSTITUTIONAL RESTRICTION OF JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that the "sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604, 98

S.Ct. at 2964 (emphasis in original) Alvord contends that the jury instructions at the sentencing hearing violated the Lockett rule by limiting the jury to considering only statutory mitigating circumstances. See Washington v. Watkins, 655 F 2d 1346, 1377 (5th Cir. Unit A 1981) (invalidating sentence on basis of faulty instructions), cert. denied, 456 U.S. 949, 102 S.Ct 2021, 72 L.Ed.2d 474 (1982). The district court correctly analyzed and resolved this issue.

The judge instructed the jury in this case that the "aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence ..." and then listed the statutory aggravating circumstances. The judge then instructed the jury that the "mitigating circumstances which you may consider if established by the evidence

are these . . ." and then listed the statutory mitigating circumstances. In Ford v. Strickland, 696 F.2d 804 (11th Cir.1983) (en banc),

> Instructing the jury on aggravating circumstances, the trial judge stated, "[y]ou shall consider only the following ...," and read the statutory language. With regard to mitigating circumstances, he said, "[y]ou shall consider the following . . .," omitting the word "only" and again reading the appropriate statutory language.

Id. at 811-12. We see no distinction of importance between the language used in Ford and that used in the present case. In neither situation did the trial judge commit the error present in Washington v. Watkins, in which the charge "operated affirmatively to preclude jury consideration of nonstatutory mitigating factors." 655 F.2d at 1377 (footnote omitted). Also, in both this case and Ford

the judge permitted the defendant freely to introduce evidence without regard to its statutory- relevance.[21] Thus, the sentence is not invalid under Lockett.

VII. PROPORTIONALITY REVIEW

Alvord's final claim is that the Florida Supreme Court failed to conduct an adequate proportionality review in this case because the "Court's comparison makes absolutely no reference to the characteristics of the offender in each prior case, comparing instead, only the facts of the crime .... In addition, [the

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[21] For example, the judge allowed Robey to testify that Alvord could be rehabilitated. Meyers relied heavily in this case on the statutory mitigating factor that Alvord was unable to conform to the requirements of the law as well as the extreme mental disturbance factor. Given the thrust of Meyers' defense, testimony establishing nonstatutory mitigating evidence was of limited value in any event. See supra note 15.

opinion does not review] all cases of a similar nature in imposing the sentence of death." We have read the opinion of the Florida Court and we find the review beyond challenge The Court stated:

> It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great See State v. Dixon [283 So.2d 1 (Fla.1973)], supra. Three murders were committed while the perpetrator was engaged in the commission of the felony offense of burglary. Each of the murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation by use of a rope. This could only be accomplished through a cold, calculated design to kill, as distinguished by a single shot from a firearm during an outburst of anger. The great risk of serious bodily harm by death to other persons is apparent, in that defendant obviously murdered two of the victims in order to avoid a surviving witness to the murder of the other victim. The murders were not committed under circumstances which defendant

believed to provide a moral justification or extenuation for his conduct and his capacity to conform his conduct to the requirements of law was not impaired. His age, 26 years, had no particular significance. These aggravating circumstances outweigh any circumstances which would mitigate the sentence in this case.

There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See State v. Dixon, supra. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the

imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death

by capital punishment in the other case.

Sullivan v. State [303 So.2d 632 (Fla 1974)], supra, involved a death sentence which was held to be appropriate by this Court. During the course of a robbery defendant abducted the victim, struck him with a tire iron, and shot him with both barrels of a shotgun in the back of the head. The defendant reloaded and discharged both barrels again into the victim's head. Just as in Sullivan, this case involves the commission of a burglary and the murder of the victim. The deliberate actions of Sullivan in repeatedly shooting the victim is no less heinous and atrocious than the actions of

defendant Alvord in deliberately strangling three women with a rope.

Gardner v. State, 313 So.2d 675 (Fla 1975), was an appeal from a death sentence for the murder of a female. The murder was accomplished by the use of a blunt instrument, the victim's body containing at least 100 bruises, abrasions and contusions. There was a massive hemorrhage of the pubic area. The victim was beaten so badly that the murder was looked upon as being especially heinous, atrocious and cruel. These aggravating circumstances outweighed any mitigating circumstances and the death penalty was upheld. Certainly, the atrocious manner in which Gardner murdered his victim is no more atrocious or heinous than the atrocious manner in which Alvord coldly strangled three females while committing his burglary.

A female victim was involved in Hallman v. State, 305 So.2d 180 (Fla.1974). The defendant committed the crime of robbery, cut the victim about the throat and neck with broken glass, slitting her throat and causing her death. Hallman had been convicted of two previous crimes involving an assault upon a young woman with a dangerous

> weapon. Alvord had been involved with the rape of a young girl in Michigan, and the evidence indicated that an assault was made upon the deceased Lynn, who was 18 years of age. The act of Hallman in cutting the victim with broken glass is no more heinous than the strangulation of three women by Alvord. Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence.
>
> Pursuant to Rule 6.16(b), Florida Appellate Rules, we have reviewed the evidence to determine whether the interest of justice requires a new trial. No reversible error is made to appear and the evidence does not reveal that the ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause.

Alvord v. State, 322 So.2d 533, 540 41 (Fla. 1975).

Since the briefs were submitted in this case, the Supreme Court issued its

decision in Pulley v. Harris, ___ U.S.___, 104, S.Ct. 871, 78 L.Ed.2d (1984). In Pulley, the Supreme Court held that the Constitution does not require a state to conduct proportionality reviews, provided that its "capital sentencing system [is not] so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review .... " Id. at ___, 104 S.Ct. at 873. Like the California system, the Florida system requires that "special circumstances," id must be found before the sentence of death may be imposed in a given case. See generally Barclay v. Florida, ___ U.S. ___ , 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct 2960, 49 L.Ed.2d 913 (1976). The Florida system also contains other checks on the discretion of the sentencing authority so

often discussed that we need not repeat them here. See id. Thus, in light of Pulley, Florida is not required to conduct a proportionality review. Alvord does not contend that he was the victim of an unequally applied proportionality review, and the review he received was as extensive as is given by the State of Florida. Thus, his attack on his death sentence on this ground is without merit.

The opinion of the district court is REVERSED in part and AFFIRMED in part.

Gary Eldon ALVORD, a/k/a Paul Robert Brock, a/k/a Gary Eldon Venczel, Petitioner-Appellee, Cross-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, Respondent Appellant, Cross-Appellee.

No. 83-3345.

United States Court of Appeals, Eleventh Circuit.

April 25, 1984.

Appeals from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 10, 1984, 11 Cir., 1984, 725 F.2d 1282).

Before HILL and FAY, Circuit Judges, and ALLGOOD,* District Judge.;

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

Gary Eldon Alvord has moved that this court grant a rehearing in his case, Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984). In section IV of our opinion, at 1298-99, we concluded that the contended failure of the police officer to advise Alvord of his right to have a lawyer appointed if he could not afford one would not render his statement inadmissible. Alvord argues that Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), does not support our conclusion.[22] In appraising this

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[22]a. In his petition for rehearing, Alvord points out that the court in Michigan v. Tucker relied in part on the timing of Tucker's arrest. Tucker was arrested before the Court issued its decision in Miranda; however, because he was tried after Miranda, the decision applied at his trial. Michigan v. Tucker, 417 U.S. at 435, 94 S.Ct. at 2359. The Court stated that the protections of

contention, we have made a further complete review of Alvord's trial, and we substitute the following for the second full paragraph of section IV of our opinion.

We find both of Alvord's arguments that are directed to the adequacy and form of his Miranda warnings to be without merit. First, it is clear that the failure

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Miranda are not constitutional, but "prophylactic," id. at 439, 94 S.Ct. at 2361, thus causing some commentators to question the constitutional basis of the Miranda rule and its continuing vitality in habeas corpus proceedings. See, e.g., Stone, The Miranda Doctrine in the Burger Court, 1977 Sup.Ct.Rev. 99, 115-25. Nevertheless, the Court also stated that "[w]e consider its significant that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda, 417 U.S. at 447, 94 S.Ct. at 2365, thus limiting its holding so that it does not directly govern this case. We perceive the effect of the Michigan v. Tucker case to be, at best, unclear; we therefore decide on rehearing to refuse to rely on that case. We need not address Michigan v .Tucker's applicability in this case given our present resolution of the issue.

of the officer to obtain a written waiver in no way rendered the statement inadmissible. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Second, the record does not support Alvord's contention that the officer failed to advise him of his right to have counsel appointed if he could not afford one. The state trial court conducted a hearing, out of the presence of the jury, to determine the admissibility of the officer's testimony. There was no testimony that the officer did not give full Miranda warnings and advice. The officer stated at the hearing that he advised Alvord of his rights as follows:

> Q. Okay. And did you, in fact, talk to him?
> A. Yes, sir, I did.
> Q. Okay. Did you advise him of his rights?
> A. Yes, sir, I did.

Q. And what did you tell him regarding his rights?
A. First of all I advised him that, who I was. I advised him who I was and that I was a detective with the Police Department in Lansing. I advised him that he didn't have to talk to me, that anything he said would be used in court against him. I advised him that he had to, he had a right to an attorney. He had a right to have an attorney present before he answered any questions or made any statement.
Q. All right. Did he request to have an attorney?
A. No sir, he did not.
Q. Did he request to remain silent?
A. No, sir, he did not.
Q. Did you or anyone in your presence promise him anything in order for him to make a statement?
A. No, sir.
Q. Did you or anyone in your presence threaten him to make a statement?
A. No, sir.
Q. Did you promise him immunity if he made a statement?
A. No, sir.
Q. Did you coerce him in any way to make a statement?
A. No, sir.

Q. Did he indicate whether or not he understood his rights?
A. Yes, sir. he told me he was aware of his rights.
Q. All right. And then what did you say to the defendant, Gary Alvord?
A. At this time I advised him that I wanted to talk to him about a safe job.
Q. Okay. What did he say?
A. Just looked at me and said, "I am a rapist, not a God-damn thief."
Q. And what did you say at that point?
A. I said, "What do you mean by that"?
Q. What did he say?
A. He then said, "I am wanted in Florida for three murders."
Q. And what did you say?
A. I said, "I thought it was two."
Q. What did he say?
A. He said, "Maybe they forgot one."
Q. And what did you say to that?
A. I looked at him and said, "Did you do it?"
Q. And what did he respond?
A. He said, "They will have to prove it."
Q. Okay. Anything further regarding the conversation?

At this point, the officer testified that Alvord indicated that he had nothing more to say. There was no other testimony taken on the sufficiency of the Miranda warnings.

The trial judge refused to admit any testimony as to Alvord's prior misconduct (which consisted of the officer's statement that Alvord was suspected of committing a burglary) except Alvord's comment that he was a rapist. In the presence of the jury (with the exception of the burglary testimony) the officer's testimony was in all material respects the same as his testimony at the exclusion hearing.

In this habeas corpus proceeding, Alvord must prove his right to relief by a preponderance of the evidence. It is not the state's responsibility to prove that Alvord received the proper warnings; it is

Alvord's responsibility to prove that he did not. Corn v. Zant, 708 F.2d 549, 563 (11th Cir.1983); Hill v. Linahan, 697 F.2d 1032, 1036 (11th Cir.1983); Henson v. Estelle, 641 F.2d 250, 253 (5th Cir.), cert. denied, 454 U.S. 1056, 102 S.Ct. 603, 70 L.Ed.2d 593 (1981). Alvord relies solely on the above excerpt as proof of his contention that the officer did not advise him of his right to have counsel appointed for him. At the evidentiary hearing in the district court, 564 F.Supp. 459, Alvord made no effort to elaborate on the officer's testimony as it appears in the state transcript.[22] From the transcript, we conclude that Alvord failed to meet his burden of proof.

The transcript demonstrates that the

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[22]b. On cross-examination, the officer reiterated that Alvord had assured him that he understood his constitutional rights.

officer affirmatively testified that he advised Alvord of his Miranda rights. See supra italicized portion of transcript excerpt. Despite this affirmative testimony, Alvord seeks to establish that the officer did not properly repeat the warnings by relying on the officer's testimony that he informed Alvord of his "right to have an attorney present before he answered any questions or made any statement." Alvord relies, apparently, on the officer's failure specifically to mention that Alvord was entitled to appointed counsel; this does not prove that the officer did not properly inform Alvord of his rights.

The officer testified without qualification that he gave Alvord the proper warnings. The failure of the officer to use the word "appointed" when reviewing the contents of those warnings

does not establish that his previous testimony was incorrect or incomplete. First, the officer did not attempt to explicitly state the warnings, and he was not requested to do so. Alvord's attorney cross-examined the officer, but never attempted to establish the deficiency Alvord now asserts. He attempted to establish other deficiencies in the warning. Second, the officer's informal reference to Alvord's "right" to counsel certainly is a clear enough shorthand method for referring to the right to counsel regardless of ability to pay. The officer testified to an unqualified "right" to counsel; this is not a case, as was Lathers v. United States, 396 F.2d 524, 533 (5th Cir.1968), in which the officer testified, "we don't furnish attorneys ... they have the prerogative to call one." Indeed, the Supreme Court,

itself, has summarized the essence of the Miranda warnings in a fashion remarkably similar to that used by this officer:

> "In Miranda v. Arizona, the court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. 384 U.S. [436], at 479 [86 S.Ct. 1602, 1633, 16 L.Ed.2d 694]. The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, "the interrogation must cease." If he requests counsel, the interrogation must cease until an attorney is present." Id, at 474 [86 S.Ct. at 1627].

Edwards v. Arizona, 451 U.S. 477, 481-82, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378 (1981) (emphasis added). The officer's summary of Miranda warnings, which was as complete as the Court's, was adequate. Absent any caveat to his testimony that

Alvord had been given his rights, there is no proof that he was not. Alvord has thus failed to meet his burden of proving that he did not receive the proper warnings. With these additional observations, the petition for rehearing is DENIED.

No member of this panel or judge in regular service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is

DENIED.

No. 83 6807. Gary Eldon Alvord, Petitioner v. Louie L. Wainwright, Secretary, Florida Department of Corrections

469 US 956, 83 L Ed 2d 291, 105 S Ct 355.

October 29, 1984. The petition for a writ of certiorari is denied.

Same case below, 725 F2d 1282.

Justice Marshall, with whom Justice Brennan joins, dissenting.

This petition asks us to consider whether an attorney renders effective assistance of counsel when he forgoes all investigation into his client's only plausible line of defense and defers to his client's wishes on defense strategy, without any regard for the client's knowledge of, or ability to understand, the law, the facts, or the ramifications of the decision.

The question could scarcely be more starkly posed. The petitioner here had previously been adjudicated insane at a criminal trial, and his reasoning faculties were therefore highly suspect. Yet appointed counsel accepted his client's initial refusal to rely on the insanity defense, made no independent investigation of his client's mental or criminal history, learned no facts that would enable him to persuade his client to change his mind, and instead permitted his client to rely on an unsupported alibi that all acknowledged to have been, at best, weak. The lower court approved this course of conduct on the ground that the client was found competent to stand trial and therefore was entitled to have his wishes followed. Because I believe the lower court decision seriously misconstrues the constitutional role of a

criminal defense lawyer, I would grant certiorari to review the decision.

I

The record demonstrates unequivocally that Gary Alvord has a long history of mental illness. He first entered a mental hospital at age 13. In 1967, he was charged in Michigan with rape and murder; he spent two years in a mental hospital and was then declared competent to stand trial. At a bench trial, he was found not guilty by reason of insanity and was committed to the custody of the Michigan Department of Mental Health. After escaping from the Ionia State Hospital in Michigan, he traveled to Florida, where he committed the three murders for which he received the death sentence in Florida.

Counsel, a part-time public defender, was appointed to represent Alvord after

his indictment in 1973. Alvord refused to talk to the lawyer; instead, it was the prosecutor who told counsel that Alvord had been adjudicated not guilty by reason of insanity in Michigan. Counsel moved for a mental examination, and two psychiatrists were directed to conduct the examination. Ultimately, the trial judge ruled that Alvord was competent to stand trial.[1]

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[1] Alvord declined to talk to the two psychiatrists unless his lawyer was present. His lawyer did not attend the meetings, and the psychiatrists were unable to give an opinion on his mental state. Thereafter, the State brought in one of the psychiatrists who had known Alvord in Michigan. Alvord spoke with him, and the psychiatrist concluded that Alvord was competent to stand trial. The two other psychiatrists then sought to interview Alvord again. One of them concluded that he was competent to stand trial. The other declined to draw a conclusion. The trial judge then determined that Alvord was competent to stand trial.

Appointed counsel saw Alvord for about 15 minutes after Alvord was indicted. Counsel's subsequent pretrial contact with his client was primarily at court hearings. According to the Court of Appeals, Alvord's counsel conducted no independent investigation into Alvord's history of mental illness. He did not contact doctors, other than one brought in by the State to interview Alvord, see n 1, supra, at the Michigan hospital where Alvord had spent considerable time, and he only obtained a small portion of Alvord's medical record. He made no effort to have that portion of the medical record examined and interpreted by a psychiatrist. He did not offer to the court any document or testimony indicating that Alvord had previously been adjudicated incompetent, even after the trial judge observed that no such evidence

was presented. Nor did he raise at trial the presumption of insanity afforded Alvord under Florida law, because of his prior adjudication of insanity, the effect of which would have been to place the burden of proof on the prosecution to prove sanity beyond a reasonable doubt.[2] Nor, apparently, did counsel even inform Alvord of this legal principle and its potential consequences. Finally, counsel apparently did not contact the attorney who represented Alvord during the Michigan prosecution, who would have told him that Alvord initially had been disinclined to assist in his best defense there as well,

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[2] See Livingston v. State, 383 So.2d 947 (Fla. App. 1980) (Florida presumes insanity, once one has been adjudged insane, until it is shown that sanity has returned); Hixon v. State, 165 So.2d 436, 439 (Fla. App. 1964) (reversing conviction for failure of prosecutor to overcome defendant's presumption of insanity, which had been established in a prior Ohio adjudication).

until he had come to trust counsel.[3] "In short, [counsel] undertook virtually no investigation of the one defense [counsel himself] considered viable in Alvord's case, choosing instead to comply with

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[3] At the federal habeas hearing, one of Alvord's Michigan psychiatrists testified:

> "Now, as his lawyer, at that time, Mr. Richey, was a very competent individual. Mr. Alvord would not cooperate and initially we were feeling very much we were going to again have to find him incompetent, but we had a sixty day period during this, worked with him, and I think it was after about a month we finally got sufficient work done to cooperate, but this took a lot of work on Mr. Richey's part in terms of seeing him, letting him know what was going on, letting him feel that he really was being represented, and I worked with him during this period also. <u>But, there was a built in core of feeling about lawyers and the same thing was seen here, so that the similarity was certainly a warning.</u>" Pet for Cert 14 (emphasis added).

Alvord's request that he put petitioner on the stand and proceed with an alibi defense." 564 F Supp 459, 471 (MD Fla 1983). The lower court opinions and findings establish that counsel made absolutely no effort to pursue the possibility of an insanity defense, after his unstable client's uneducated objection to the possibility, but instead unquestioningly accepted his client's direction to pursue a frivolous alibi defense.

The federal habeas court rejected Alvord's claim on the ground that counsel acted reasonably in deciding that it would be useless to pursue an insanity defense because Alvord would not cooperate. Id., at 473-474. This argument wholly misses the mark. The question is whether counsel had a duty to investigate his client's case and make a minimal effort to persuade

him to follow the only plausible defense. The question is not whether counsel has a duty to override his client's wishes, or pursue fruitless investigations, thereafter. The Court of Appeals adopted the District Court's reasoning and also observed that Alvord had been found competent to stand trial—in part because counsel had failed to present to the court evidence of the prior insanity adjudication—and that counsel "was ethically bound to follow his client's wishes" as a result. 725 F2d 1282, 1289 (CA11 1984). This holding is the crux of the decision. With this ruling, the Eleventh Circuit has loudly and clearly signalled that counsel need not question a client's decisions on crucial trial issues as long as the client is found competent to stand trial, even if counsel's professional judgment suggests to him that

an alternative decision would be in the client's best interests.

II

It is crucial to recognize precisely what is at issue here. The lower courts in this case have interpreted our decisions to hold that counsel has absolutely no obligation to investigate, at all, the only plausible defense a defendant might have, and no obligation to provide advice on that issue, once the defendant indicates a desire not to pursue that defense, even when the client's reasoning faculties are highly suspect. The decision establishes that absolute deference to the uninformed reaction of a defendant is acceptable, and that counsel's decision not to pursue the issue and make an attempt to persuade his client is reasonable.

This result renders meaningless defense counsel's vital function as an adviser. Counsel must ensure that the client has access to information relevant to the pretrial and trial decisions that the accused must make himself, such as whether to testify on his own behalf, to waive a jury trial, or to plead guilty.[4]

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[4] The lower court ruling is therefore premised on a significant understanding of the division of responsibility between counsel and client at trial, and of the obligation of counsel to inform himself and advise his client, as set out in the ethical standards of the American Bar Association. As this Court recognized last Term, those standards act as guides in determining the reasonableness of counsel's assistance. See Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). The ABA's Standards of Criminal Justice, Part V, entitled Control and Direction of Litigation, are especially relevant. That section provides: "Standard 4-5.1. Advising the defendant

> "(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor considering all

Each of these decisions involves the waiver of a constitutional right and must be made by the accused, but with the

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> aspects of the case, including a candid estimate of the probable outcome.

Standard 4-5.2. Control and direction of the case

> "(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decision which are to be made by the accused after full consultation with counsel are:
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> "(i) what plea to enter;
> "(ii) whether to waive jury trial; and
> "(iii) whether to testify in his or her own behalf.
> "(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic ad tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA Standards for Criminal Justice 4-5.1, 4-5.2 (2d ed 1980 and Supp 1982).

advice of counsel. Counsel's role is to provide advice that will assure not only that the waiver is voluntary and intelligent, but also that the accused is reasonably well informed. See McMann v. Richardson, 397 US 759, 769-770, 25 L Ed 2d 763, 90 S Ct 1441 (1970). Thus, if pursuit of an insanity defense is a decision to be made by the accused, it must be done on the advice of a well-informed attorney who has assured that his client has based his decision on relevant information.[5]

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[5] Ethical Consideration 7-7 of the American Bar Association Code of Professional Responsibility suggests that the decision on an insanity defense might ultimately be one for the client, but that it must be made after the lawyer has fully informed himself and his client on the issue. The section reads in pertinent part:

"A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the

Of course the need for assistance of counsel extends well beyond assistance in deciding whether to waive constitutional rights. The Sixth and Fourteenth Amendments embody "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced

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prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken."

Ethical Consideration 7-8 provides that "[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." ABA/BNA Lawyers' Manual on Professional Conduct 01:332-01:333 (1984). Under the lower court ruling, however, once a presumptively insane client has made a decision that is obviously prejudicial, the attorney has no obligation to try to persuade his client otherwise by informing him of relevant considerations.

and learned counsel." Johnson v. Zerbst, 304 US 458, 462-463, 82 L Ed 2d 1461, 58 S Ct 1019, 147 ALR 357 (1938). Thus, counsel is authorized to make certain choices for his client, after consultation with the client, during which counsel, who is fully informed of the facts, discusses the options with his client. As this Court has noted, "[w]ith the exception of [the three] specified fundamental decisions [involving waiver of constitutional rights], an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." Jones v. Barnes, 463 US 745, 753, n 6, 77 L Ed 2d 987, 103 S Ct 3308 (1983). When counsel is obliged to make the decision himself, blind deference to a client's wishes, without any investigation, is unquestionably

inappropriate and constitutionally ineffective.

Thus, regardless of whether the ultimate decision on an insanity defense is that of the attorney or his client, counsel must fully inform himself of the facts and law, make a reasonable investigation into the only plausible line of defense, and share his conclusions with his client. This is the essence of effective assistance of counsel. This conclusion, which I would have thought to have been well ingrained in our Sixth Amendment jurisprudence, is wholly at odds with the view that a lawyer reasonably may assume that his client—no matter what his training or mental capacity—has based his decision on sufficient information and knowledge as to render the lawyer's further effort unnecessary. To my mind, such total deference is only proper, if at

all, when counsel has good reason to assume that his client's decisions are based on an intelligent and informed understanding of his situation.

Moreover, the analysis and result below are inconsistent not only with fundamental principles of the role of counsel, but also with a decision in another Circuit, thereby rendering this case particularly appropriate for certiorari. In contrast to the Eleventh Circuit, the Fourth Circuit has affirmed the grant of a habeas petition when counsel had totally failed to develop the only conceivable defense at the defendant's state trial, and had neglected to advise the defendant properly as to his legal alternatives. See Brennan v. Blankenship, 472 F Supp 149 (WD Va 1979), aff'd, 624 F2d 1093 (1980). In Brennan, counsel had permitted himself to be guided

by the defendant's aversion to insanity pleas. The court applied the "normal level of competence" test and found that under any professional standard, it was improper for counsel to rely blindly on the statement of a criminal client whose reasoning abilities are highly suspect, and that counsel at least had a duty to investigate and try to persuade his client. As the court wrote, "[g]iven the attorneys' reasonable conclusion that there was no other factual defense or factors in mitigation, it is almost incredible that the attorneys did not press Brennan on the point." 472 F Supp, at 156. Neither the Court of Appeals, nor any papers filed here, come even close to distinguishing this case.

III

In this case, defense counsel avoided all responsibility to investigate his client's only plausible defense, to inform his client of the legal ramifications of an insanity plea (of which it is far from certain counsel was even aware), to assure that the decision was not based on a lack of information, to talk with psychiatrists to determine whether his client understood the ramifications of his decision, to talk with prior counsel to discover that Alvord had in the past hesitated to trust counsel until he was made to feel he was being properly represented, to consider whether the insanity defense was a strong one, or to find out that Florida law would have shifted the burden of proof on insanity because of Alvord's prior insanity adjudication. Prior to trial, he met with his client—the client who was facing trial

for three capital murders—for only 15 minutes outside of court. During this time, his client was in jail, under suicide watch, with no lights in his cell, no furniture except a mattress, no blanket, and no clothing. Also during this time, Alvord refused to talk with psychiatrists unless his lawyer was present, yet his lawyer never visited him in jail, nor attended the interview sessions. It is difficult to imagine how the trial would have differed had Alvord had no counsel at all. There can be little doubt that under almost any standard other than that recognized by the lower courts, counsel's assistance here would be considered constitutionally ineffective.

IV

I continue to adhere to my view that the death penalty is in all circumstances

cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See Gregg v. Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (Marshall, J., dissenting); Furman v. Georgia, 408 US 238, 314, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (Marshall, J., concurring). But even if I did not so believe, I would grant certiorari in this case. The lower court has countenanced a view of counsel's constitutional duty that is blind to the ability of the individual defendant to understand his situation and usefully to assist in his defense. The result is to deny to the persons who are most in need of it the educated counsel of an attorney. To avoid that result, I would grant the petition. I dissent from the Court's refusal to do so.

Gary Eldon ALVORD, Petitioner,

Richard L. DUGGER, etc., et al., Respondents.

No. 71192.

Supreme Court of Florida.

Feb. 9, 1989.
Rehearing Denied May 11, 1989.

PER CURIAM.

Gary Eldon Alvord petitions this Court for a writ of habeas corpus and seeks a vacation of his death sentence and a new trial or, in the alternative, a new sentencing proceeding. We have jurisdiction. Art. V, § 3(b)(1), (9), Fla. Const. We deny relief.

The evidence at trial demonstrated that Alvord entered and burglarized the house of Ann Herrmann. During the burglary, he committed three murders by using a piece of cord and strangling Ann, her mother, Georgia Tully, and her

daughter, Lynn Herrmann. Further, a vaginal test on Lynn revealed semen. On April 9, 1974, the jury convicted Alvord of three counts of first-degree murder. The jury recommended the death penalty, and the trial judge imposed that sentence. This Court affirmed both the conviction and the death sentence in Alvord v. State, 322 So.2d 533 (Fla.1975) [Alvord I], cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

On November 29, 1976, Alvord filed a motion, pursuant to Florida Rule of Criminal Procedure 3.800, seeking a reduction in his sentence. The trial court denied the motion, and, on review, this Court denied his petition for a writ of mandamus in an unreported order on March 10, 1977 [Alvord II].

On October 6, 1978, Alvord filed a motion for post-conviction relief pursuant

to Florida Rule of Criminal Procedure 3.850. The trial court denied the motion and this Court affirmed that decision. Alvord v. State, 396 So.2d 184 (Fla.1981) [Alvord III]. Alvord then sought relief in federal court by filing a petition for a writ of habeas corpus. Alvord v. Wainwright, 564 F.Supp 459 (M.D.Fla.1983). After the district court granted part of the petition with respect to the penalty phase, id. at 490-91. the Eleventh Circuit Court of Appeals reversed and held that both the conviction and the sentence should be affirmed. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). The failure to allow nonstatutory mitigating circumstances was addressed and rejected in that federal court proceeding. Id. at 1299.

On November 20, 1984, Alvord petitioned this Court for a writ of extraordinary relief and requested a judicial determination of his competency to be executed separate from the existing procedure under section 922.07, Florida Statutes (1983). This Court denied that petition in Alvord v. State, 459 So.2d 316 (Fla.1984) [Alvord IV].

Alvord initially presented the instant habeas corpus petition before this Court seeking (1) a stay of the mental examination directed by the governor to determine his competency to be executed and (2) a new sentencing proceeding because neither the trial judge nor the jury considered nonstatutory mitigating circumstances during the sentencing phase, in violation of the rule set forth by the United States Supreme Court in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821,

95 L.Ed.2d 347 (1987). We denied the requested stay of the mental examination in an unreported order. Subsequently, Alvord filed an amended habeas corpus petition, adding the ground that we erred in affirming the trial court's admission of his statements when no proper warning of his right to counsel as an indigent was given. Here, he argues that since we subsequently recognized this specific error in Caso v. State, 524 So.2d 422 (Fla.), cert. denied, ___ U.S. ___ 109 S.Ct. 178, 102 L.Ed.2d 147 (1988) and expressly receded from our earlier holding in Alvord I, we should now rectify this error and grant a new trial. We granted oral argument on the Hitchcock and confession claims.

Hitchcock Claim

In Hitchcock, the United States Supreme Court held that, absent harmless error, resentencing was required when the jury was instructed to consider only evidence of statutory mitigating circumstances and the judge failed to consider nonstatutory evidence. Hitchcock v. Dugger, 107 S.Ct. at 1824. At the outset, we note that the state concedes a Hitchcock violation because all participants—the prosecutor, the defense counsel, and the trial judge-explained to the jury that it should limit consideration of mitigating circumstances to those enumerated in the statutes.

We recognize the Hitchcock error and must now determine whether the error was harmless. Hitchcock; Booker v. Dugger, 520 So.2d 246 (Fla.), cert. denied, ___ U.S. ___, 108 S.Ct. 2834, 100 L.Ed.2d 935

(1988); Delap v. Dugger, 513 So.2d 659 (Fla.1987). We have previously applied the harmless error analysis to Hitchcock violations, found harmless error, and denied new sentencing proceedings. See, e.g., Clark v. State, 533 So.2d 1144 (Fla.1988); Hall v. Dugger, 631 So.2d 76 (Fla.1988); Jackson v. Dugger, 529 So.2d 1081 (Flat 1988); Smith v. Dugger, 529 So.2d 679 (Fla.1988); Ford v. State, 522 So.2d 345 (Fla.1988), petition for cert. filed (July 19, 1988); Tafero v. Dugger, 520 So.2d 287 (Fla.1988); Booker; Demps v. Dugger, 514 So.2d 1092 (Fla.1987); Delap. On the other hand, we have found that certain Hitchcock violations did not meet the harmless error test and directed a new sentencing proceeding. See, e.g., Combs v. State, 525 So.2d 853 (Fla.1988); Zeigler v. Dugger, 524 So.2d 419 (Fla.1988); Mikeras v. Dugger, 519 So.2d 601

(Fla.1988); Riley v. Wainwright, 517 So.2d 656 (Fla.1987); Morgan v. State, 515 So.2d 975 (Fla.1987), cert. denied, ___ U.S. ___, 108 S.Ct. 2024, 100 L.Ed.2d 610 (1988); Downs v. Dugger, 514 So.2d 1069 (Fla.1987).

In the instant case, the trial judge, in imposing the death sentence, found the following three statutory aggravating circumstances: (1) the murders were committed during the commission of a burglary; (2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory mitigating circumstances. He concluded that, during the commission of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to

conform his conduct to the requirements of law was impaired.

Alvord now asserts that he was denied the opportunity to present nonstatutory mitigating evidence concerning among other things: (1) his capacity for rehabilitation; (2) the history of mental illness within his family; and (3) his traumatic life experiences while involuntarily committed to mental institutions. The latter two concern Alvord's mental condition which, to a large extent, was presented to both the jury and the judge. We find the mitigating evidence clearly insufficient to change the sentencing decision, given the circumstances in this case. Based on the record, we conclude that the Hitchcock error was harmless.

Confession Error

The record establishes that the trial court admitted Alvord's statements despite the investigating detective's improper Miranda warnings. Following the arrest, the detective read Alvord his rights but failed to explain that he had a right to appointed counsel if indigent. In Alvord I, we held that this failure to give the correct Miranda warnings did not preclude the evidence from being admitted. Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). However, in Caso v. State, we receded from that holding in Alvord and stated: "We therefore recede from that portion of Alvord which holds that the trial court did not err in admitting the custodial statements of the defendant." 524 So.2d at 425.

Recognizing that the admission of these statements was error, the question we must now address is whether this error was also harmless. During trial, the state presented testimony of numerous witnesses linking Alvord to the three murders. The principal part of the state's case was not Alvord's custodial statements but the testimony of his girlfriend, Zelma Hurley. She recounted a conversation she had with Alvord the morning following the murders. She testified that Alvord told her that he went over to Ann's house the previous night to "rub out" the victims; he entered the house after kicking the door in; he placed Ann, Lynn, and Georgia in separate rooms and strangled them; he did not want to strangle the older woman but did so to avoid witnesses; and he left the home with money. The importance of her testimony was reflected in Alvord's brief on direct

appeal where he stated: "The evidence on which the state primarily built its case was the testimony of Zelma Hurley. All of the remaining testimony put on by the state was subordinate in importance to Zelma Hurley's testimony." Appellant's Opening Brief at 9, Alvord v. State, 322 So.2d 533 (Fla.1975). In that brief, Alvord also stated:

> The evidence tending to connect the Defendant with the murders consisted of the following:
>
> First. While the State maintained that the murders were committed during the course of a burglary of Ann Herrmann's home, the State also offered evidence tending to show that the Defendant had harbored a dislike for Ann Herrmann before the date of the murders. Zelma Hurley testified that the Defendant had stated to her quite a few times that he disliked Ann Herrmann, and Jeanine Brautigan testified that about a month before the murders were committed the Defendant told her he could or would choke Ann Herrmann.

Second. The State introduced evidence tending to show that the Defendant had some of Ann Herrmann's jewelry in his possession after the date of the murders. Robert Bernstein who had dated Ann Herrmann for about 8 months, testified that he had given Ann Herrmann a blue, electric cigarette lighter with gold trim which was approximately 11/2" to 2" high. George Valahakis, Ann Herrmann's exhusband then testified that he had given Ann Herrmann a wedding ring and an engagement ring. The wedding ring contained a pear shaped diamond. and the engagement ring consisted of a diamond in the center surrounded by smaller diamonds. Mr. Valahakis also testified that he had given Ann Herrmann a Bulova, lady's watch, white-gold in color, with diamonds on each side of the watch where the band joined the watch. The band was also white-gold in color and it was an expandable type band.

The watch, the rings, and the lighter were never recovered and were not introduced in evidence at the trial. The State did, however, present testimony that the Defendant had similar appearing jewelry in his possession shortly after the murders were committed. Zelma Hurley testified that the Defendant had a gold and purple

> cigarette lighter, a pear shaped diamond ring, a ring with diamonds set in it in a flowered design, and a woman's watch with a small face and a stretch band in his possession on their trip to Pennsylvania shortly after the murders had been committed. Terri Williams who had seen the Defendant in Detroit, Michigan on June 25, 1973, testified that the Defendant had in his possession at that time a small woman's diamond watch with a stretch band.
>
> Third. The State introduced evidence tending to show that some physical evidence matching that found at the scene of the murders was later found in the apartment shared by the defendant and Zelma Hurley.
>
> The police found a short piece of rope in the apartment which was the same type of rope used to strangle the women, and a shirt which Zelma Hurley stated belonged to the Defendant was found in the apartment. The shirt had a small quantity of blood on it, but laboratory analysis could not identify it as to type or even identify it as human blood.
>
> ....

Id. at 7-9. We find that these circumstances distinguish the instant case

from Caso because in Caso the inadmissible testimony was the only real evidence linking the defendant to the murder. In this instance, Alvord's statements were clearly not the focus of this trial but were cumulative to the primary evidence presented by his girlfriend. In our view, the admission of the statements constituted harmless error.

After examining the record carefully, we find that there is no reasonable possibility that the Hitchcock error or the erroneously-admitted testimony contributed to the jury's verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986). Consequently, the errors, both individually and collectively, were harmless. For the foregoing reasons, we deny relief and the stay entered in this case is vacated.

It is so ordered.

EHRLICH, CJ., and OVERTON, McDONALD and SHAW, JJ., concur.

GRIMES, J., concurs with an opinion, in which EHRLICH, C.J., and McDONALD, J., concur.

KOGAN, J., dissents with an opinion, in which BARKEIT, J., concurs.

GRIMES, Justice, concurring.

While I agree that the admission of Alvord's statements can be considered as harmless error, I also believe that this Court's ruling in Caso v. State, 524 So.2d 422 (Fla.), cert. denied, ___ U.S. ___, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), should not be given retroactive effect even in this case. Caso involved the admissibility of a confession given after a defective Miranda* warning. Yet, the United States Supreme Court refused to

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* Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

give the Miranda decision itself retroactive application on the premise that a violation of the Miranda rule was less likely to affect the reliability of a confession than one induced by coercion. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882, reh'g denied, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121 (1966). Based on this rationale, both Florida, Nowlin v. State, 346 So.2d 1020 (Fla.1977), and the United States Supreme Court, Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), permit confessions obtained without proper Miranda warnings to be admitted for purposes of impeachment as long as the confessions are voluntary. Therefore, it is clear that the admission of Alvord's statements could not be deemed fundamental error.

In Alvord I, this Court interpreted Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), as authority to hold that Alvord's statements could be admitted even though his Miranda warnings failed to include the advice that an attorney would be appointed to represent him if he were indigent. As a result of the United States Supreme Court's more recent interpretation of Michigan v. Tucker in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), we found it necessary to recede from that position. However, the point was squarely decided against Alvord in Alvord I and only changed after a later Supreme Court decision demonstrated that we had previously misinterpreted Michigan v. Tucker. As related to any other defendant, this would constitute an evolutionary change in the law within the contemplation

of Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), and I do not think that the principle is any different simply because it is Alvord who now complains.

EHRLICH, CJ., and McDONALD, J., concur.

KOGAN, Justice, dissenting.

I cannot agree that the admission of petitioner's statements in violation of Caso v. State, 524 So 2d 422 (Fla.), cert. denied, ___ U.S. ___, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), is harmless error. The state's case against petitioner rested primarily, and almost exclusively, upon the testimony of Zelma Hurley. Petitioner's statements of the police in Michigan corroborated and gave credibility to the testimony of Ms. Hurley. The state

in its closing argument o the jury put great emphasis on this statement and its importance in explaining the theory of the case. This error certainly cannot be classified as harmless.

I also cannot agree that the jury's inability to consider certain nonstatutory mitigating circumstances, such as petitioner having been a patient in mental institutions for twelve of the fourteen years preceding the commission of this crime while undergoing treatment as a paranoid schizophrenic, can be said to be harmless error beyond and to the exclusion of every reasonable doubt. The jury may have returned a recommendation of life imprisonment had it been permitted to consider this evidence and the trial judge in sentencing the petitioner might have been required to follow this recommendation under Tedder v. State, 322

So.2d 908 (Fla.1975), because the recommendation would have been reasonable.

I would grant the petition and vacate the petitioner's conviction and sentence and remand for the purpose of conducting a new trial as to both guilt and penalty.

BARKETT, J., concurs.

SUPREME COURT OF FLORIDA
WEDNESDAY, MAY 28, 1997

GARY ELDON ALVORD,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 86,837
	*	
STATE OF FLORIDA,	*	Circuit Court
	*	No. 73-1398
	*	(Hillsborough)
Appellee.	*	

* * * * * * * * * * * * * * *

Appellant's Motion for Rehearing filed in the above cause is hereby denied.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur

KOGAN, C.J. and ANSTEAD, J., dissents

A True Copy TC

TEST:

By

Sid J. White
Clerk, Supreme Court

cc: Hon. Richard L. Ake, Clerk
Hon. Diana M. Allen, Judge
Mr. William J. Sheppard
Mr. Adam B. Allen
Ms. Elizabeth L. White
Mr. D. Gray Thomas
Ms. Candance Sabella

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court in and for Hillsborough County, Florida

WHEREAS, in that certain cause filed in this Court styled:

GARY ELDON ALVORD v. STATE OF FLORIDA

Case No.: *86,837*

Your Case No.: *73-1398*

The attached opinion was rendered on: **April 10, 1997**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Gerald Kogan, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 27th day of June, 1997.

_____

Clerk of the Supreme Court of Florida

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL
CIRCUIT, IN AND FOR
HILLSBOROUGH COUNTY,
FLORIDA, CRIMINAL
DIVISION

CASE NO: 73-1398

DIVISION - C

STATE OF FLORIDA

vs.

GARY ELDON ALVORD, a/k/a
PAUL ROBERT BROCK, a/k/a
GARY ELDON VENCZEL

SECOND MOTION FOR POST-CONVICTION RELIEF

Comes now the defendant, Gary Eldon Alvord, by and through undersigned counsel, pursuant to Fla. R. Crim. P. 3.850, and hereby brings this Petition for Post-Conviction Relief, alleging that he was improperly restricted from presenting and arguing to his sentencing jury certain non-statutory mitigating circumstances not found on the face of the record, in violation of his Eighth Amendment Rights

under the United States Constitution and Hitchcock v. Dugger, 481 U.S. 393 (1987). Defendant further alleges:

COURSE OF PRIOR PROCEEDINGS

1. Mr. Alvord was convicted and sentenced to death for three counts of first degree murder in 1974. His conviction and sentence were affirmed on direct appeal by the Florida Supreme Court in Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923 (1976). Pursuant to Fla.R.Crim.P. 3.850 he filed a Motion for Post-Conviction relief, which alleged as one of its grounds the trial court's limitation by jury instruction of mitigating circumstances. Mr. Alvord's motion was denied by the trial court on August 27, 1979, and that denial was affirmed April 9, 1981. Alvord v. State, 396 So.2d 184 (Fla. 1981).

2. Thereafter, Mr. Alvord filed a petition for writ of habeas corpus in federal district court, which asserted as one of its grounds the limitation of mitigating circumstances. This petition was granted in part on the basis of Proffitt v. Wainwright, 685 F.2d 1227, 1266-1269 (11th Cir. 1982), however, the district court rejected petitioner's claim relating to the limitation of mitigating circumstances. Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983). A new resentencing was ordered but, on appeal by the State, the district court's resentencing command was reversed by the Eleventh Circuit and Mr. Alvord's convictions and sentences were affirmed in all respects. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984). Although the Eleventh Circuit rejected Mr. Alvord's claims relating to the restriction of

mitigating circumstances, it did so on grounds which have now specifically been rejected by the United States Supreme Court in Hitchcock and by the Florida Supreme Court in Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. September 9, 1987); Thompson v. Dugger, 515 So.2d 173, 12 FLW 469 (Fla. September 9, 1987); Morgan v. State, 515 So.2d 975, 12 FLW 433 (Fla. 1987).[1]

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[1] The Eleventh Circuit held that there was no error in Mr. Alvord's sentencing proceeding because his counsel was allowed to present non-statutory mitigating circumstances during sentencing and the trial court did not instruct the jury that it could only consider the mitigating circumstances recited in the instruction. The jury, however, was instructed only as to statutory mitigating circumstances and the sentencing judge did not consider such circumstances in reaching his sentencing decision, thereby entitling petitioner to relief under Hitchcock and its progeny. The "mere presentation" doctrine relief relied upon by the Eleventh Circuit has been specifically rejected by the Florida

3. In November, 1984, pursuant to §922.07, Fla. Stat. (1983), Mr. Alvord was found incompetent to be executed by three psychiatrists appointed by the Governor. A mental examination to be conducted on September 29, 1987, was ordered by the Governor to determine if Mr. Alvord's incompetency to be executed status had changed.

4. Thereafter, on September 25, 1987, defendant filed his Petition for Extraordinary relief, for A Writ of Habeas Corpus and Request for Stay of Mental Examination before the Florida Supreme Court, seeking a stay of the compelled mental examination ordered by the Governor. This petition alleged that a mental examination should not be conducted in light of Mr. Alvord's possible

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Supreme Court. See Riley, Morgan, Thompson and Downs, supra.

resentencing under Hitchcock. On September 28, 1987, this Petition was denied without opinion. On October 10, 1987, a Motion for Rehearing and Motion for Clarification was filed seeking clarification with respect to the Hitchcock claim.

On January 26, 1988, the court directed the State to respond to the issue raised, which the State did. On July 8, 1988, defendant filed an Amendment to Petition for Writ of Habeas Corpus and Request for Oral Argument, which raised a separate claim under Caso v. State, 524 So.2d 422 (Fla. 1988).[2]

Upon oral argument, the Florida Supreme Court denied relief, finding the Hitchcock error to be harmless. Alvord v.

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[2] The Caso claim is not raised in this Petition, the Florida Supreme Court having previously resolved this issue on its merits.

State, 538 So.2d 838 (Fla. 1989), on rehearing, 541 So.2d 598 (Fla. 1989). Significantly, however, it did so only with respect to non-statutory mitigating factors developed on the face of the record. The Court did not address the restriction of non-statutory mitigating circumstances not present on the face of the record. In fact, there exist and existed significant non-record mitigating circumstances which could have been but were not presented to the jury, due to the statutory restriction on the presentation of evidence relevant to such circumstances. Under the reasoning of Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989), the defendant must be afforded the opportunity, by way of an evidentiary hearing, to represent these non-record mitigating circumstances to further substantiate his Hitchcock claim.

5. There is no procedural bar to the raising of the instant claim because the issue presented raises a question of law which has undergone a substantial change since the filing of defendant's original petition. This issue is whether the defendant was permitted to introduce and argue, for the jury's consideration, non-statutory mitigating evidence in capital sentencing proceedings. An evidentiary hearing is required so that this Court may hear evidence with respect to the existence of non-record mitigating circumstances which were present but not argued to the jury at the defendant's sentencing hearing due to the sentencing scheme in effect at that time.

Mr. Alvord's Hitchcock claim is based upon a significant change in the law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988) (Lockett/Hitchcock claims subject to

no procedural bar because Hitchcock represents a substantial change in law); Morgan v. State, 515 So.2d 975 (Fla. 197); McCrae v. State, 515 So.2d 874 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987) (Hitchcock is a "change in law" cognizable in post-conviction proceedings); see Downs v. Dugger, 514 So.2d 1069 (Fla. 1987) ("We now find that a substantial change in law has occurred that requires us to reconsider [a Hitchcock issue]"; merits relief granted); Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988).

Hitchcock v. Dugger did not exist when Mr. Alvord presented his case to this Court in his prior 3.850 petition. Because Hitchcock constitutes a "substantial change" in the law, an evidentiary hearing on this issue and relief is warranted. Downs, supra. See,

also, Cooper v. Wainwright, 807 F.2d 881, 889 (11th Cir. 1986) (evidentiary hearings generally required in cases raising Lockett v. Ohio claims); Lemon v. State, 498 So.2d 923 (Fla. 1986) (evidentiary hearing warranted when the "files and records" do not "conclusively show that the defendant" is entitled to no relief."); O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984) (same); State v. Sireci, supra, 502 So.2d at 1224 (same standard; successive post-conviction action). The "files and records" by no means show that Mr. Alvord is entitled to "no relief" on this claim.

Mr. Alvord was tried in 1974, before Lockett and Songer, at a time when Florida judges and lawyers labored under the view that the introduction of evidence in mitigation of a capital sentence was restricted to a narrow statutory list.

See Songer v. Wainwright, 769 F.2d 148, 1494 (11th Cir. 1985) (en banc) (Hall, Kravitch, Johnson and Anderson, JJ., concurring) ("Of course, neither the State trial judge's nor Singer's counsel's [preclusive] construction of the state was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time.") See also Harvard v. State, 486 So.2d 537 (Fla. 1986); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); Hargrave v. Dugger, 832 So.2d 1529 (11th Cir. 1987) (en banc). Mr. Alvord's trial counsel operated under that "reasonable" but unconstitutionally restrictive interpretation, believing that nonstatutory mitigating circumstances were not admissible at the sentencing hearing. As a consequence, Mr. Alvord was denied an individualized and reliable capital sentencing determination through the

operation of state law. The fact that this is not Mr. Alvord's first Rule 3.850 action does not obviate the need for a proper evidentiary hearing -- even in second or third post-conviction actions an evidentiary hearing is proper when the files and records do not conclusively show that movant is entitled to "no relief" on properly brought claims. Sireci, supra, 502 So.2d at 1224; Crew, supra, 477 So.2d at 985 (evidentiary hearing and stay proper on basis of allegations in defendant's successive Rule 3.850 action because "the files and records ... [did] not conclusive show that the defendant [was] entitled to no relief ...").

6. Under the reasoning of Adams v. State, ___ So.2d ___, 14 FLW 235, 237, f.n. 3 (Fla. May 12, 1989), Mr. Alvord's petition is timely filed. ("We have delayed the application of this

interpretation of the rule until July 1, 1989, in order not to penalize other defendant who might be in the same position as Adams.")

7. The jury was instructed in this case as follows:

> The mitigating circumstances which you may consider if established by the evidence are these:
>
> A, the defendant has no significant history of prior criminal activity.
>
> B, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> C, the victim was a participant in the defendant's conduct or consented to the act.

D, the capital felony was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

E, the defendant was an accomplice in the capital felony committed by another and his participation was relatively minor.

F, the defendant acted under duress or under the domination of another person.

G, at the time of the capital felony the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or

H, the youth of the defendant at the time of the crime.

[Tr. 1229-1230]. Such instruction establishes that the jury was not free to consider non-statutory circumstances, in violation of the Hitchcock doctrine.

STATEMENT OF FACTS AND NATURE OF RELIEF SOUGHT

8. Throughout his life Gary Eldon Alvord has been the victim of one of the most extreme forms of psychiatric disorders known to the medical profession. He was first institutionalized when he was thirteen years old. He remained in such institutions in Michigan until early 1973, when he escaped and came to Florida. He was under an adjudication of insanity and incompetency at the time of the crimes for which he had been condemned to die.

9. At the time of Mr. Alvord's trial, Florida law precluded jurors from considering non-statutory mitigating circumstances. For this reason, counsel for Mr. Alvord did not investigate or develop a substantial number of non-statutory mitigating circumstances present in Mr. Alvord's life. For instance, the jury heard no evidence of Mr. Alvord's traumatic life as a child and later, as a teenager. Indeed, Mr. Alvord spent virtually all of his teenage years involuntarily committed to mental institutions. But the jury was only the defendant's mental condition at the time of the cirme. Mr. Alvord's mental history could not be and thus, this evidence was not presented

The mitigating circumstance of Mr. Alvord's mental history was compelling, but it did not "fit" within the stringent

category of mental condition at the time of the crime. These non-mitigating circumstances were critical, yet under the jury instructions given the jury was not free to consider them. More importantly, Mr. Alvord's counsel did not feel free to develop them. Thus, the trial court erroneously limited consideration of psychological facts to the statutory mental mitigation, thereby severely restricting the jury's consideration of it. Messer v. Florida, 834 F.2d 890, 893-895 (11th Cir. 1987).

10. There also existed substantial evidence of Mr. Alvord's capacity for rehabilitation - another factor which could not be considered by the jury in reaching is recommendation. Although the jury was advised of this fact, as well as the fact that Mr. Alvord was married and the father of a young child, during jury

instructions it specifically was told that it could only consider the statutory mitigating factor set forth in the statute. Following the jury instructions given, it was compelled to disregard these facts.

11. In addition, there existed substantial evidence, not apparent from the face of the record, which could have been considered by the jury in reaching its recommendation. Counsel for Mr. Alvord respectfully requests this Court to conduct an evidentiary hearing so that he may present evidence, which was in existence at the time of his sentencing hearing, with respect to the following non-statutory mitigating factors: 1) drug and alcohol abuse and intoxication throughout his life and on the day of the crime; 2) family history and background to establish the systematic and continuous

deprivation of comfort, care and love when he was child; 3) his entire mental history[3] and; 4) his capacity for rehabilitation. None of this information was considered by the jury. Indeed, most of it was not heard by the jury due to the preclusion of presenting such evidence by §921.141, Fla .Stat. (1987).

12. The unconstitutional preclusion of the jury's consideration of such factors reaches to the heart of the fairness and accuracy of the sentencing determination. The proper sentence should be determined by a jury and a judge upon full consideration of all relevant mitigating factors "rather than by this Court on the face of a cold record."

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[3] Although Dr. Robey presented fragments of Mr. Alvord's mental history, his testimony was far from complete and omitted crucial facts concerning Mr. Alvord's life in Michigan's mental hospitals.

Harvard v. State, 486 So.2d 539. The Florida Supreme Court has never hesitated to reverse for resentencing where the mitigating instructions were erroneous,[4] for under Florida law "[i]t is the jury's task to weigh the aggravating and mitigating evidence." Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987).

The sentencing proceedings in Mr. Alvord's case are substantially identical to those faced in Hitchcock where "it could not be clearer that the advisory

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[4] Floyd v. State, 497 So.2d 1211 (Fla 1986) (Failure to instruct on mitigation denied "the right to an advisory opinion from a jury" even though this Court affirmed the trial judge's rejection of mitigation); Toole v. State, 479 So.2d 731 (Fla. 1985) (failure to instruct on section (6)(b) mitigating); Robinson v. State, 487 So.2d 1040 (Fla. 1986) (failure to instruct on two of the statutory mitigating factors because while the judge "may not have believed it, ... others might have"). See also Patten v. State, 467 So.2d 975 (Fla. 1985) (Allen charge); Rose v. State, 425 So.2d 521 (Fla. 1983) (same).

jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." 481 U.S. at 398. The sentencing also is the same in all material respects as that faced by the Florida Supreme Court in Lucas v. State, 490 So.2d 943 (Fla. 1986), where the record revealed that all parties understood and adhered to the statutory restriction on mitigating circumstances at the original pre-Songer sentencing trial. In Lucas "a scant twelve pages" was devoted to sentencing. Id. at 946. The record in Mr. Alvord's case just as complete as Lucas' was abbreviated and restricted to statutory mitigation.

13. Resentencing before a new jury is the constitutional mandate, for the pre-Songer sentencing is fatally flawed. The defendant respectfully requests this

Court to conduct an evidentiary hearing by which to enable the defendant to prove such available nonstatutory mitigating factors and, upon its conclusion, to order a new sentencing hearing in this cause.

WHEREFORE, the defendant respectfully requests this Court to grant him an evidentiary hearing in this cause, and upon its conclusion, to vacate his sentences of death and order him resentenced in accordance with the Hitchcock mandate.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

By /s/ Wm. J. Sheppard

Wm. J. Sheppard, Esq.
Fla. Bar No. 109154
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661
ATTORNEYS FOR DEFENDANT

VERIFICATION

STATE OF FLORIDA :
: SS.
COUNTY OF BRADFORD :

Before me, the undersigned authority, this day personally appeared Gary Eldon Alvord, and says that he is the defendant in the above-styled cause, that he has read the foregoing, and that he has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

/s/ Gary Eldon Alvord
GARY ELDON ALVORD

Sworn to and subscribed before me this _____ day of June, 1989.

NOTARY PUBLIC, State of Florida at Large.

My Commission expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peggy Ann Quince, Esquire, Assistant Attorney General, 1313 Tampa Street, Ste. 804, Park Trammel Building, Tampa, Florida 33624, by mail, this 30th day of June, 1989.

/s/ Wm. J. Sheppard
ATTORNEY

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH
COUNTY, FLORIDA, CRIMINAL
DIVISION

CASE NO: 73-1398
DIVISION: C

STATE OF FLORIDA

vs.

GARY ELDON ALVORD, a/k/a
PAUL ROBERT BROCK, a/k/a
GARY ELDON VENCZEL

AMENDMENT TO SECOND MOTION
FOR POST-CONVICTION RELIEF

Comes now the defendant, Gary Eldon Alvord, by and through undersigned counsel, pursuant to Fla. R. Crim P. 3.850 and the order of the Florida Supreme Court in Spalding v Dugger, _ So.2d ___, Case No. 74,355 (June 30, 1989) and hereby amends his previously filed Second Motion for Post-Conviction to include the following allegations within the Statement of Facts:

1. Gary Alvord suffers from a genetic mental disorder, in the form of schizophrenia, which has plagued his family for three generations His mother, Gertrude Alvord, suffered from nervous breakdowns throughout her life, requiring repeated hospitalizations and continuous medication. His son Gary, Jr., likewise suffers from this disorder and manifests many of the same symptoms as his father.[1]

2. As the result of her mental illness, Gertrude Alvord was unable to care for her son and indeed, rejected him at birth. She told one of Gary's treating physicians that she was "displeased" when she learned at 24 years old that she was pregnant because it was "too soon", even though she already had another child.

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[1] See the affidavit of Helen B. (Lee) Norton attached hereto as Exhibit "A" and incorporated by this reference.

According to information received[2], Mrs. Alvord suffered from a total breakdown shortly after her son's birth and had to be hospitalized.[3] Thus, as a young infant he was completely cut off from any maternal nurturing and was effectively abandoned by his mother. Gertrude's mental illness prevented her from being a parent to her son. He was often neglected. All of his early childhood pictures depict Gary in old coveralls or other used clothing (sometimes female) and in a state of disorder. When Gary was 12 years old, one of his treating physicians noted, "In the interview Mrs. Alvord appeared to be very

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[2] Gertrude Alvord is now deceased. Pursuant to §15.231 and §333.1823, Michigan Statutes, counsel for Mr. Alvord is now seeking to obtain Mrs. Alvord's psychiatric records to further illustrate the facts alleged in this petition.

[3] She was rehospitalized when Gary was 11 years old.

confused and frequently was irrational. Mrs. Alvord a former mental patient is currently on convalescent status. Because of her apparent rather poor remission, it is not felt that she is capable of becoming involved in planning for Gary." Lacking maternal love, Gary sucked his thumb until he was 11 years old. He received no parental supervision. Still, as a child he was "quiet, docile and very kind to pets. He loved dogs and cats especially."[4] He was also a good elementary school student.

3. Mr. Alvord also suffered from severe rejection by his father, who blamed Gary for his wife's illness. Although he had the funds to do so, Mr. Alvord did not buy his son adequate clothing, so that

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[4] These notations are contained in medical records which were <u>not</u> presented to the sentencing judge and jury.

Gary was forced to wear second-hand clothes. His father was extremely cold and even hostile to Gary, a fact noted by physicians when Gary was only 11 years old. Early psychiatric records of Gary Alvord refer to "...his previous severe experiences of rejection by his parents and parent figures." when Gary was 12 years old, Dr. S. Bloomberg noted that upon questioning Gary about, "...his severe rejection by his parents, the patient completely broke. His facade of bravado and grandiosity collapsed so that he began to weep in an uncontrollable fashion." His admission reports often refer to him as "rather thin", ill-kept and "not too neatly dressed or groomed."

4. Although neither of his parents attended church or took their son to church, Gary sought out and attended a Baptist Church, without his parents

assistance. The only religious views he learned were self-taught.

5. Before he was 11 years old, Mr. Alvord's parents placed him in foster homes and group homes, where he suffered repeated abuse. Homosexuality and involuntary homosexual activity were rampant at Northville Hospital, where Gary was placed when he was 12 years old. During the summer, temperatures inside Northville often exceeded 100 degrees, with no ventilation. once institutionalized, Gary was rarely visited by his parents, nor did they inquire about his well-being, except to indicate that they could provide no financial support for him.

6. Other family members likewise rejected Gary; when he was 8 years old his maternal grandmother forever barred him from her home because he did not stay in

the yard on one occasion when told to do so. During his critical adolescent years he was essentially abandoned by his entire family.

7. Despite her rejection of Gary, he remained a loyal and devoted son to his mother throughout her life, frequently sending her postcards and paintings he had made.

8. During the time in which the crimes for which he was convicted, Mr. Alvord was under the extreme influence of drugs and alcohol, to the extent that he was frequently irrational and disoriented as to time and place.

9. During his incarceration at the Hillsborough County Jail, Mr. Alvord was, for months at a time, stripped naked in a solitary cell, without sheets or linens, and in extreme conditions of confinement. Nonetheless, he never presented any

behavior problems while incarcerated there.

10. At trial, Mr. Alvord waived his defense of insanity, even though this defense could have resulted in his acquittal on all counts.

11. Mr. Alvord is, and throughout his life has been, an extremely talented artist. Lacking funds he has often made his own materials. His artwork is reflective of another side of his personality which was not presented to the jury - that of a sensitive individual.

12. At present, there exist additional mitigating non-statutory circumstances which should be considered by this Court in determining the merits of this petition, namely that: a. Mr. Alvord continues to suffer from mental illness to such a degree that he has been found to be incompetent to be executed pursuant to

§922.07, Fla. Stat. (1987); b. his parents are both now deceased and he is without any family; and c. his good behavior while incarcerated for these crimes.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

By: /s/ Wm. J. Sheppard
Wm. J. Sheppard, Esq.
Florida Bar No: 109154
215 Washington Street
Jacksonville, FL 32202
(904) 356-9661
ATTORNEYS FOR DEFENDANT

VERIFICATION

STATE OF FLORIDA :
: SS.
COUNTY OF BRADFORD :

Before me, the undersigned authority, this day personally appeared Gary Eldon Alvord, and says that he is the defendant in the above-styled cause, that he has read the foregoing, and that

he has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

/s/ Gary Eldon Alvord
GARY ELDON ALVORD

Sworn to and subscribed before me this 1st day of August, 1989.

Notary Public
State of Florida at Large
My Commission Expires: 8-10-91

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peggy Ann Quince, Esquire, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammel Building, Tampa, Florida 33624, by mail, this 1st day of August, 1989.

/s/ Wm. J. Sheppard
ATTORNEY

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH
COUNTY, FLORIDA, CRIMINAL
DIVISION

CASE NO: 73-1398
DIVISION: C

STATE OF FLORIDA

vs .

GARY ELDON ALVORD, a/k/a
PAUL ROBERT BROCK, a/k/a
GARY ELDON VENCZEL

AFFIDAVIT

COUNTY OF DUVAL :
ss:
STATE OF FLORIDA :

BEFORE ME, the undersigned authority, personally appeared Helen B. (Lee) Norton, who after being duly sworn, affirms and deposes that she is a private investigator licensed through the State of Florida. On July 17, 1989, I interviewed Brenda Brock, formerly known as Brenda Alvord, with respect to her knowledge of Gary Eldon

Alvord and his childhood. Ms. Brock relayed the following information to me:

1. Brenda Brock met Gary Eldon Alvord in 1966, when she was 15 years old, through mutual friends in their neighborhood. Gary and Brenda knew each other for about a year when they got married.

2. Gary was very good to Brenda when they were together. He was never physically or mentally abusive. They were very close and very much in love.

3. Gary worked most of the time they were together, and always brought his paycheck home to use for living expenses. He never went out drinking at bars, like some men did.

4. They had pets and Gary was very good with them. He always fed them and walked them and made sure they were clean

and healthy. He seemed to really enjoy them.

5. She knew both Gary's parents - Gertrude (Gertie) and Eldon (Al). She lived with them for about six months when Gary was in Ionia State Hospital. The best way to describe Gary's family was very cold. There was never any warmth between any of them. She never saw them hug or touch each other, or say they loved one another. It was a sterile environment, which hurt Gary very much. It was as if Gary was in the way - one didn't get the impression that he was loved or wanted.

6. She recalled one incident in particular which is a good example of how Gary's family was. Gary and Brenda were dating; they were talking about getting married. One night, during a time when Brenda was having some problems at home, she went to Gary's house to spend time

with him. When it started getting late, Gary asked his dad if Brenda could spend the night on the couch. His father wouldn't hear of it, and refused immediately. Gary got upset and asked his father why she couldn't stay. Gary seemed to take it as a real rejection of himself; he started crying and said, "Dad, I love you, I love you." Al was stone cold. He appeared to be totally disgusted with Gary. All he said was "Get the hell out of here." It was awful. Gary was so hurt. He wanted love and affection from his parents so badly, but, from what Brenda saw, mostly what he got was rejection.

7. She didn't know Gary when he was a child, but she recalled conversations in which he talked about his childhood. One of his most vivid memories was of how his parents would only buy him clothes from

Goodwill and second-hand shops. According to Brenda, Gary is a sensitive person, so this was very embarrassing because he would have to wear second-hand, worn-out coveralls to school everyday and would be made fun of by the other children. From what Brenda saw, and understood from conversations over the years, it wasn't really necessary that Gary go without; his parents had enough money to buy him decent clothes but they just wouldn't spend it on him. Brenda recalled that this hurt Gary a lot, and made him feel rejected and unimportant.

8. Gary told Brenda of another incident which seems to show how big an issue money was in the Alvord home and how Gary responded to it. He said that when he was 4 or 5 he found a jar of money in the house and ran outside and threw it up in the air "for everyone to have." When he

talked about his childhood, it sounded as if his parents were so preoccupied with making and saving money that they didn't have time for Gary. What's more, they never spent the money on Gary, or on family things. Brenda could not recall Gary ever talking about family trips, or going to the movies or bowling. They just didn't seem like a family.

9. According to Brenda, the relationship between Gary's parents was really odd. Gertie absolutely idolized Al. Her world revolved around him. She was always fussing over him, bringing him food and drinks, asking if he needed anything, if everything was okay. Al, on the other hand, treated her horribly. He completely ignored her. He hardly said a word to her or was appreciative of what she did for him. Brenda said it was like Gary didn't have parents at all. It was more like his

father was the person who provided the bare necessities, and his mother was another sibling, a child herself.

10. Gertie was mentally ill most of her life. According to Brenda, Gary's father always blamed him for Gertie's breakdowns, but Brenda was told that his mother had a breakdown right after Gary was born. Brenda recalled that Gertie was hospitalized then. The other times she broke down she had to be tied down and taken to the hospital in an ambulance.

11. During the months Brenda lived with Gertie and Al, and over the years she knew them, Gertie never acted normal. According to Brenda, one thing you couldn't miss was her voice. It was always high pitched and strained. She was always nervous. She paced the floor constantly. Another thing which was odd was that she wouldn't leave the house. Brenda's most

frequent memory is of Al going off to the horse races and Gertie staying home to "watch the house." She felt she had to stay there so that no one would rob them. But they didn't have anything to steal because they wouldn't part with a penny. According to Brenda, Gertie was definitely not in touch with reality. When she spoke, she would change the subject right in the middle of a sentence. She couldn't finish a thought or an idea. The doctor kept her on medicine called Thorazine, which was supposed to keep her from having nervous breakdowns. Brenda thought it helped some, but she was still very mentally ill. That's why Gertie could never be a real mother to Gary. Brenda said she seemed more like a family friend, nice but distant.

12. During the time Brenda stayed with Gertie and Al, they only went to see

Gary at Ionia a few times. That made it hard for Brenda because she didn't have a car or any money. Once when she went with Al he made advances toward her. He put his hand in her blouse. Brenda was only about 16 or 17, at that time, and he was 60. She told him he had better keep his hands to himself, and tried to stay away from him after that. The thought of it still sickens her today.

13. Brenda always suspected that Gertie and Al didn't have much of a sexual life because Gertie once told Brenda that they had a rule of always sleeping with the bedroom door open. Gertie told Brenda that there wasn't any need to keep it closed anyway, except for 3 minutes a month. After what Al did to Brenda, she said she wondered what he was doing all those nights when he said he was at the horse races.

14. Brenda believes that Gary's mental illness is hereditary. It came from his Mom's side of the family. Brenda had hoped it would not affect their son, Gary Jr., but it has. He is mentally ill, too. The doctor said he is psychotic. He said Gary should be in a mental institution, but Brenda is afraid to put him in a place like Gary, Sr., was in because she remembers how badly the patients are treated there. She doesn't have money for private hospitals, which would probably be better than Northville, so she is trying to take care of him at home.

15. Watching little Gary grow up has been terribly frightening for Brenda because she has seen him gradually get worse and worse, just like Gertie and Gary. At first Brenda didn't want to believe it was happening; she thought that since Gary hadn't ever been around his

father that he couldn't become like him. But her three other children, by her second marriage, are fine, not like Gary at all. She believes that what is wrong with him is genetically inherited, and that he can't help it. She indicated that she is doing everything she can to make sure he isn't put into a sterile environment with people who don't understand him or care for him, like Gary was. She believes he is sick, just like his father, and that he needs help.

16. She would have told what she knows at the time of Gary's trial, but his lawyer didn't ask her and she didn't know it was important. She is willing to provide additional information concerning Gary if requested.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Helen B. (Lee) Norton
Helen B. (Lee) Norton

Sworn to and subscribed
before me this 31st day of
July, 1989.

Notary Public
State of Florida at Large

My Commission Expires:

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

vs CASE NO. 73-1398

GARY ELDON ALVORD DIVISION "C"

_____/

ORDER GRANTING EVIDENTIARY HEARING ON SECOND MOTION FOR POST CONVICTION RELIEF

THIS CAUSE having come before the Court upon the Defendant's Second Motion for Post Conviction Relief filed on or about June 30, 1989, and Amendment to Second Motion for Post Conviction Relief and the State having filed a Response to Defendant's Second Motion for Post Conviction Relief, Motion for Summary Judgment and Memorandum of Law in Support Thereof and the Defendant having filed a Memorandum in Support of Defendant's Second Motion for Post Conviction Relief

on May 11, 1992, and this Court, having reviewed those pleadings, the files and records in the case and all case authority cited by the Defendant and the State, finds that the Defendant is entitled to an evidentiary hearing in which he may present evidence of non-statutory mitigating evidence that could have been presented at sentencing, but was not due to Hitchcock error, and further the Court will consider argument of counsel on the standard to be utilized, i.e. (a) whether the error was harmless beyond a reasonable doubt, (Meeks v. Dugger, 576 So.2d 713, 716 (Fla. 1991), and Hall v. State 541 So.2d 1125, 1128 (Fla. 1989)) or (b) whether a totality of the evidence establishes the existence of substantial nonstatutory mitigating evidence not previously introduced, (Meeks v. Dugger, 576 So.2d 713, 719, concurring opinion),

or (c) whether the Hitchcock error would likely affect the outcome of the proceeding (Hall v. State, supra, dissent at p. 1129, utilizing the test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 8 L.Ed.2d 674 (1984). It is therefore

ORDERED AND ADJUDGED that this matter is scheduled for a status review on Friday, November 13, 1992, at 8:30 a.m. or as soon thereafter as counsel may be heard for the purpose of scheduling an evidentiary hearing.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 2nd day of November, 1992.

/s/ Diana M. Allen
DIANA M. ALLEN
CIRCUIT JUDGE

Copies to:

Copies to:

Candance M. Sunderland, Esquire
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607

State Attorney's Office, Division "C"

Wm. J. Sheppard, Esquire
215 Washington Street
Jacksonville, Florida 32202

Gary Eldon Alvord c/o
Wm. J. Sheppard, Esquire

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY,
FLORIDA, CRIMINAL DIVISION

CASE NO: 73-1398

DIVISION: C

STATE OF FLORIDA

vs.

GARY ELDON ALVORD, a/k/a
PAUL ROBERT BROCK, a/k/a
GARY ELDON VENCZEL
_____/

SECOND AMENDMENT TO SECOND MOTION
FOR POST-CONVICTION RELIEF

Comes now the defendant, Gary Eldon Alvord, by and through undersigned counsel, pursuant to Fla. R. Crim. P 3.850, and hereby amends his previously filed Second Motion for PostConviction Relief to include the following claim:

ADDITIONAL CLAIM

MR. ALVORD'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE

SENTENCING PROCEEDING, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9, 16, and 17 OF THE FLORIDA CONSTITUTION.

This claim is evidenced by the following facts:

1. All other allegations and factual materials contained in Mr. Alvord's pending motion for post-conviction relief, as amended, are incorporated herein by specific reference.[1]

2. Mr. Alvord's death sentence resulted from multiple errors in the instructions to his jury concerning the proper eighth amendment weighing of aggravating and mitigating circumstances. That there was fundamental constitutional error in the instructions to the jury is a

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[1] References to Mr. Alvord's original record-on-direct appeal will be designated as "R" followed by the corresponding page in the record, e.g., "R 1204."

matter which is now not open to debate. Espinosa v. Florida, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). Nor is there any question that in an appropriate case, those errors require that a new sentencing proceeding be conducted. James v. State, 18 F.L.W. S139 (Fla., March 4, 1993). In James, the Florida Supreme Court held that Espinosa must be retroactively applied to cases where the Espinosa error was preserved at trial and raised on direct appeal. Id. This is such a case.

A. "INVALID" AGGRAVATING CIRCUMSTANCES WERE PRESENTED TO MR. ALVORD'S JURY.

3. In Sochor v. Florida, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992), the Supreme Court made clear that the eighth amendment is violated whenever the sentencer in a "weighing" state, like Florida, considers an "invalid" aggravating circumstance. An aggravating circumstance may be invalid

either because it does not apply as a matter of law, 119 L.Ed.2d at 341, or because it is so undefined that it fails to offer adequate guidance to the sentencer. Both errors occurred at Mr. Alvord's trial. As the Court noted in Sochor, either type of error tilts the weighing process in favor of death:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. _, _ (1992) (slip op. at 12), by placing a "thumb [on] death's side of the scale," Id., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of "the

> individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, 494 U.S. at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ___, ___ (1991) (slip op. at 11).

Sochor, 119 L.Ed.2d at 336-37.

4. In the instant case, the trial court instructed the jury to consider two aggravating factors that are unconstitutionally vague and that encouraged the jury to recommend a sentence of death for improper reasons. In addition, the jury was instructed improperly that they could "double" two aggravating factors that derive from precisely the same set of operative facts. These errors require that Mr. Alvord's death sentences be invalidated. Stringer v. Black, 112 S. Ct. 1130 (1992). Specifically, the jury was instructed:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:
>
> . . .
>
> C, that at the time the capital felony was committed the defendant also committed another capital felony.
>
> D, that the defendant knowingly created a great risk of death to many persons.
>
> . . .
>
> H, that the capital felony was especially heinous, atrocious or cruel manifesting exceptional depravity.

R 1227-28.

5. The trial court specifically found all three of the above factors to be present, in addition to a fourth factor (committed during the course of a burglary). R 97-98.

6. The Florida Supreme Court upheld the trial court's findings of all four aggravating factors, including the

"especially heinous," "great risk of death to many," and "also committed another capital felony" aggravating factors. Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). Espinosa makes clear, however, that the analysis does not end with the trial court findings concerning aggravating circumstances, but must extend to the jury's weighing process also:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So.2d 908, 910 (Flat 1975), or death, see Smith v. State, 515 So.2d 182, 185 (Flat 1987), cert. denied, 485 U.S. 971 (1988); Grossman v. State, 525 So.2d 833, 839, n. 1 (Flat 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of

> that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore was error.

Espinosa, 112 S. Ct. at 2928 (emphasis added).

"Heinous, atrocious, or cruel" aggravating circumstance

7. Espinosa specifically holds that Florida's standard jury instructions on the "especially heinous, atrocious or cruel" aggravating factor violate the eighth amendment. As the Court noted in Espinosa, the weighing of an aggravating circumstance violates the eighth amendment if the description of the circumstance "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. The Court further noted that it previously held "instructions more specific and elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id.

8. After concluding that, in every sense meaningful under the eighth amendment, the Florida jury indeed sentences, the Supreme Court had no

difficulty in concluding that the provision of the Florida "heinous, atrocious, or cruel" instruction violated the eighth amendment. The error in Espinosa was not cured by any trial court "independent" weighing of aggravation and mitigation, even though in Espinosa, unlike the instant case, the trial court did not improperly weigh the "especially heinous "aggravator:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S 367, 376-77 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation. the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for

> arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result. therefore. was error.

Espinosa, 112 S. Ct. at 2928 (emphasis added).

9. Espinosa makes it undeniable, therefore, that where a Florida jury recommends death after receiving either the standard jury instruction or any similar instruction that suffers from the defects identified by the Supreme Court, the verdict is infected with eighth amendment error for precisely the same reasons as in Shell v. Mississippi, 498 U.S. (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); and Godfrey v. Georgia, 446 U.S. 420 (1980). In such cases, the death sentence is tainted because the jury presumably weighed an invalid aggravating factor, thus placing a thumb on "death's

side of the scale." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

10. The "especially heinous" instruction actually given by the court at Mr. Alvord's trial, over the defendant's pretrial objection, suffered from the same defects as the standard jury instruction recently held to be invalid, and virtually ensured that the jury would find and weigh the factor, despite the fact that such a finding would violate both Florida law and the United States Constitution.

11. This instruction suffers from the very same defects that are fatal under Espinosa and the United States Supreme Court's other cases regarding the definition of aggravating factors. The instruction allows the jury to find and weigh the aggravating factor if they determine that the crime was either "heinous" or "atrocious" or "cruel," and

then provides definitions of those terms that themselves provide no guidance to the jury, but merely "pejorative adjectives" that "describe the crime as a whole." See Arave v. Creech, 113 S. Ct. 1534, 1541 (1993). As a result, even assuming arguendo that the definition of "cruel" or the "designed to inflict a high degree of pain" language was adequate, the definitions of "heinous" ("extremely wicked or shckingly evil," R 1228), and "atrocious" ("outrageously wicked and vile," id.), permitted the lay jury to apply the aggravating factor to virtually any first degree murder. This is precisely the same defect that the Supreme Court found in the Mississippi jury instruction struck down in Shell v. Mississippi, 498 U.S. 1 (1990). See id. (Marshall, J., concurring).

12. In Espinosa, the Court held that where an improper instruction is given, it may be presumed that the jury weighed the invalid aggravating factor. Espinosa, 112 S. Ct. at 2928. In the instant case, in addition to this presumption, we can be virtually certain that the jury weighed the factor improperly. In closing argument, the prosecutor seized on the facts preceding the homicide in arguing vehemently that the aggravating factor applied and that Mr. Alvord should be put to death. The trial court found the factor applicable.

13. During closing argument, the prosecutor exacerbated the harm to Mr. Alvord of instructions that encourage the jury to vote for death on the basis of vague, undefined factors. In contravention of the purpose of the statute, which is to guide the jury's discretion away from

arbitrary and capricious decision making, the prosecutor invoked his own expertise and urged the jury to find this crime "especially heinous" based on his experience as a prosecutor:

> Ladies and gentlemen, I can think of no crime that I have ever heard in Hillsborough County or anywhere else, for that matter, that is any more atrocious, any more cruel, any more brutal than this crime.

R 1205-06.

14. Almost any juror, hearing this passionate plea or considering the facts recited by the prosecutor, in light of the instruction given by the court, would find that the murder was "especially heinous." Moreover, we can be virtually certain that the jury did in fact weigh the aggravator, because the trial judge who gave the instruction himself weighed it. The trial judge, who presumably interpreted the "especially heinous" aggravating factor in

the same manner as he instructed the jury, found the factor to be present. There can be no question that the trial court's erroneous instruction and the prosecutor's argument urged the jury to apply an invalid aggravating factor, and it must be presumed that they did so. The constitutional error is apparent.

"Great risk of death to many persons" aggravating circumstance.

15. In addition to being improperly instructed to consider the unconstitutionally vague and invalid "especially heinous" aggravating factor, Mr. Alvord's jury was also instructed on a second factor that is undisputable inapplicable under Florida law: "D, that the defendant knowingly created a great risk of death to many persons." Florida law could not be clearer on the inapplicability of that factor to the

facts of Mr. Alvord's case. This factor only applies where there is a "likelihood or high probability, and the great risk of death created by the capital felon's actions must be to many persons." Jackson v. State, 599 So. 2d 103 (Fla. 1992); Williams v. State, 574 So.2d 136 (Fla. 1991); Hallman v. State, 560 So. 2d 223 (Fla. 1990); Lusk v. State, 446 So. 2d 1038 (Fla. 1984); Mason v. State, 438 So. 2d 374 (Fla. 1983); Kampf v. State, 371 So. 2d 1007 (Fla. 1979); Elledge v. State, 346 So. 2d 998 (Fla. 1977).

16. In arguing for the applicability of the "great risk to many" aggravator, the prosecutor told Mr. Alvord's jury:

> The next one is D. The defendant knowingly created a great risk of death to many persons. Great risk of death to many persons. (sic) When he broke the door down and entered the residence, armed with a gun, with the rope, with the gloves, with the idea of robbery, burglary, rape, and

> murder, he created a great risk of death to many people. He then, of course, carried that out by strangling each and every one of the [three] occupants in the house.

R 1204.

17. In the absence of a limiting instruction, the jury was left with virtually no guidance other than that provided by the State in its closing argument concerning the application of this aggravating factor. The State argued that the jury could rely on a variety of facts to find the aggravating factor, including, e.g., that Mr. Alvord allegedly "broke the door down," was "armed with a gun, with the rope, with the gloves." Obviously, such a construction would require the application of the "great risk of death to many" aggravator to any crime in which the defendant was "armed with a gun," or "broke the door down" -- hardly

the requisite "narrowing" function required of aggravating factors. Accordingly, the instruction on the "great risk of death to many persons" aggravating factor failed to offer the jury any meaningful guidance, and thus violated the eighth amendment.

Doubling of the great risk of death to many persons" and "the defendant also committed another capital felony" instructions.

18. At the time of Mr. Alvord's trial, in 1974, § 921.141 included an aggravating factor that has since been removed from the statute: "C, that at the time the capital felony was committed the defendant also committed another capital felony." The exact same evidence was used to support this aggravating factor and the factor discussed above: "D, that the defendant knowingly created a great risk of death to many persons." The state's

argument as to each of these factors was virtually the same. As to factor D, as discussed, the state argued, "He then, of course, carried that out by strangling each and every one of the [three] occupants in the house." As to factor C, the state argued, similarly, "that the defendant not only committed one capital felony, not only two felonies but three capital felonies on June 17, 1973." R 1204.

19. It has long been the law of this State that two aggravating factors that are both based on the same facts cannot be separately weighed against the defendant. Provence v. State, 337 So. 2d 783 (Fla. 1976); Thomas v. State, 456 So. 2d 454 (Fla. 1984).

20. These errors violated Mr. Alvord's fundamental constitutional rights. As the Supreme Court made clear in

Espinosa, the Florida penalty phase jury indeed sentences. Espinosa, 112 S.Ct. at 2928. Where the jury sentences, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 497 U.S. 639, 653 (1990). In the instant case, permitting the jury to "double" two aggravating factors based on the same exact facts left the jury free to improperly give separate weight to the "great risk" and "another capital felony" aggravating factors. See Castro v. State, 597 So. 2d 259 (Fla. 1992). The jury's consideration of improper additional aggravating factors invalidates the death sentence. Stringer v. Black, 112 S. Ct. 1130 (1992).

B. THE EIGHTH AMENDMENT ERROR WHICH INFECTED THE JURY'S WEIGHING PROCESS IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

21. The effect of jury weighing of an invalid aggravating factor on the resulting death sentence has been discussed by the United States Supreme Court in a number of cases, notably Espinosa and Stringer v. Black, 112 S. Ct. 1130 (1992). In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, invalidates the death sentence:

> Although our precedents do not require the use of aggravating factors, they have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a

> sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Id. at 1139 (emphasis added).

22. Consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the scales and depriving the defendant of the right to an individualized sentence:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Id. at 1137. The jury's "weighing process" in Mr. Robinson's case was "skewed" in the same way that the process was skewed by the invalid aggravator in Espinosa.

23. The Florida Supreme Court did not conduct any review of the effect of the error in the instructions to Mr. Alvord's jury on the "heinous, atrocious, or cruel, "great risk to many,'' or the "another capital felony" aggravating factors. On direct appeal, the court never acknowledged that there was any error in the jury instructions. Alvord v. State, 322 So. 2d 533 at 540. Mr. Alvord's jury was presented with three aggravating factors that were invalid under Espinosa. The State argued with equal furor that these three aggravating factors were applicable and justified a sentence of death. None were emphasized more or less than the other. Any one of the errors

standing alone requires a resentencing in this case before a new jury.

24. The instructional errors in this case were similar, but even more prejudicial to Mr. Alvord, than the error that the Florida Supreme Court held required reversal in James v. State, 18 F.L.W. S139 (Fla., March 4, 1993). In James, the Florida Supreme Court struck the "especially heinous" aggravating factor on direct appeal, leaving four valid aggravating factors and no mitigating factors. The court determined that the trial court's error in finding the aggravating factor was harmless. James v. State, 453 So. 2d 786 (Fla.), cert. denied, 469 U.S. 1098 (1984). When the court considered the effect of the Espinosa error in instructing James' jury

on the invalid aggravating factor, however, it could not say that the error was harmless:

> In closing argument the state attorney argued forcefully that the murder was heinous, atrocious or cruel. On appeal, on the other hand, we held that the facts did not support finding that aggravator. James, 453 So. 2d at 792. Striking that aggravator left four valid ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. We cannot say beyond a reasonable doubt, however, that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given.

James, 18 F.L.W. at S139 (second rule 3.850 action) (emphasis added).

25. In the instant case, the Florida Supreme Court left undisturbed the trial court's finding of four valid aggravating factors. Here, as in James, the state

attorney "argued forcefully" that the aggravators applied. Four purportedly valid aggravating factors were left, but in contrast to James, the trial court here found two significant mitigating factors: statutory factors (B), that Mr. Alvord "was under the influence of extreme mental or emotional disturbance," and (G) that Mr. Alvord's "capacity to conform his conduct to the requirements of law was impaired." R 98-99. Thus, since the error was not harmless in James, the error with respect to the especially heinous" aggravating factor alone cannot be harmless here. When the effect of the additional unconstitutional instructions on the "great risk of death to many" and "another capital felony" aggravating factors is considered as well, there can be no question that the multiple jury instruction errors prejudiced Mr. Alvord.

26. This Court cannot assume that the sentence would have been death if "the thumb" of an invalid aggravating circumstance -not to mention two other fingers -- "was removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. This Court cannot find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). Mr. Alvord is entitled to a resentencing.

C. AT THE TIME OF MR. ALVORD'S DIRECT APPEAL THERE WAS NO "REASONABLE BASIS UPON WHICH TO FORMULATE" THE INSTANT CLAIM.

27. In Reed v. Ross, 468 U.S. 1 (1984), the Supreme Court made clear that the failure to preserve an issue at trial or on direct appeal will be excused by

"the novelty of the issue at the time." Id. at 12. The Court held:

> Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar.
>
> . . .
>
> In addition, if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition.

Id. at 15-16. Mr. Alvord's direct appeal was decided in 1975, before Florida's death penalty statute, or indeed any capital statute, had been found to be constitutional by the United States Supreme Court. See e.g., Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida,

428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). Mr. Alvord's appeal was decided before counsel could reasonably have known that vagueness in capital jury instructions would become an issue of such pervasive focus in the courts. See, e.g.:, Godfrey v. Georgia, 446 U.S. 420 (1980). Even so, his trial and appellate attorneys both raised the issue of the statute's vagueness, if not with the specificity and precision that is now customary. Similarly, Mr. Alvord's direct appeal was decided even before Florida law held that a jury's sentencing recommendation is supposed to be given "great weight" by the trial judge. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

28. It is axiomatic that in capital cases there is a heightened "need for reliability in the determination that death is the appropriate punishment in a

specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Clearly, a death sentence imposed on the basis of the jury's improper consideration of three aggravating factors lacks the requisite "reliability" for such a sentence to be carried out. But for the jury's consideration of these improper factors, only two aggravating factors would properly have been found. When weighed against the mitigating factors present, there is a strong likelihood that Mr. Alvord would not have been sentenced to death. For these reasons, this Court must vacate the sentences of death so imposed.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

By: /s/ Wm. J. Sheppard
Wm. J. Sheppard, Esq.
Florida Bar No. 109154
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
ATTORNEYS FOR DEFENDANT

VERIFICATION

STATE OF FLORIDA)
) ss.
COUNTY OF BRADFORD)

BEFORE ME, the undersigned authority, this day personally appeared GARY ELDON ALVORD, who, being first duly sworn, and says that he is the Defendant in the above-styled cause, that he has read the foregoing, and that he has personal knowledge of the facts and matters therein set forth and alleged; and that each and

all of these facts and matters are true and correct.

/s/ Gary Eldon Alvord
GARY ELDON ALVORD

SWORN TO AND SUBSCRIBED before me by GARY ELDON ALVORD, personally known to me, or identified by _____, this 2d day of June, 1993.

_____
NOTARY PUBLIC
State of Florida at large
My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Chris Watson, Assistant State Attorney, 800 East Kennedy, Courthouse Annex, Tampa, FL 33602, by hand delivery this 4th day of June, 1993 and to Candace Sutherland, Assistant Attorney General, 2002 N. Lois

Avenue, Suite 700, Tampa, FL 33607, by U.S. Mail this 4th day of June, 1993.

/s/ Wm. J. Sheppard
ATTORNEY

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY CRIMINAL JUSTICE
DIVISION

STATE OF FLORIDA,

CASE NO. 73-1398

vs.

DIVISION "C"

GARY ELDON ALVORD,

_____/

ORDER DENYING DEFENDANT'S SECOND MOTION FOR POST CONVICTION RELIEF

THIS CAUSE having come before the Court upon Defendant's Second Motion for Post Conviction Relief, as Amended, filed through counsel, and the Court having considered the Motion, the Response to Defendant's Second Amendment to Second Motion for Post Conviction Relief filed by the Office of the Attorney General, oral argument by counsel, and having once granted an evidentiary hearing and said hearing never having occurred due to continuance granted for good cause, the

Court sua sponte ordered a rehearing for oral argument and having heard oral argument by counsel on July 19, 1995, the Court now finds that the issues raised by the Defendant for relief pursuant to Hitchcock v. Dugger, 481 U.S. 393 (1987) and Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 852 (1992), are procedurally barred, and it is hereby,

ORDERED AND ADJUDGED that the Motion as amended is DENIED.

THE DEFENDANT HAS THIRTY (30) DAYS FROM THE DATE OF THIS ORDER TO APPEAL.

DONE AND ORDERED at Tampa, Hillsborough County, Florida, this 28th day of September, 1995.

/s/ Diana M. Allen
DIANA M. ALLEN
CIRCUIT JUDGE

Copies furnished to:
State Attorney's Office - Division C
Office of the Attorney General
William J.Sheppard, Esquire, for
Defendant

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY STATE OF FLORIDA

THE STATE OF FLORIDA

VS CASE NO. 73-1398

GARY ELDON ALVORD, DIVISION "C"
a/k/a PAUL ROBERT BROCK,
a/k/a GARY ELDON VENCZEL

COURT'S FINDINGS OF FACTS
IN SUPPORT OF THE DEATH PENALTY

The Court has carefully considered and reviewed the testimony, evidence and finding of guilt by the jury of Murder in the First Degree. The Court has also considered and reviewed the evidence and testimony submitted by the State of Florida and the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, at the sentencing proceeding and the Jury's recommendation that the death penalty be imposed in this case, and in consideration thereof makes the following findings of fact.

AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, murdered GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN from a premeditated design and while the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, was engaged in the commission of a felony, to-wit: Burglary.

(B) That at the time the capital felony was committed the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, also committed two other capital felonies, to-wit: Murder First Degree.

(C) That the murders of GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN by the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, were especially heinous,

atrocious and cruel.

(D) That the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offenses for which he was convicted created a great risk of serious bodily harm and death to many persons.

AS TO MITIGATING CIRCUMSTANCES:

(A) The Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, has a significant history of prior criminal activity.

(B) That the capital felonies for which the Defendant. GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL was convicted were committed while the Defendant, GARY ELDON

ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, was under the influence of extreme mental or emotional disturbance.

(C) That the victims, GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN were not participants in the Defendant's conduct nor did the victims, GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN, consent to the act.

(D) That the capital felonies for which the Defendant, GARY ELDON ALVORD,a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL. was convicted were not committed under circumstances which the Defendant believed to provide a moral justification or extenuation for his conduct.

(E) That the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, was the only

participant in the capital felony for which he has been convicted.

(F) That the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, did not act under duress during the commission of the offense nor was he, during that period of time under the domination of another person.

(G) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct was not impaired, however the Defendant's capacity to conform his conduct to the requirements of law was impaired.

(H) The age of the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, to-wit: age 26 years, has no particular

significance and therefore not a mitigating circumstance.

Therefore, it is the Opinion and Determination of the Court, and the Court so finds that aggravating circumstances do exist, and that these aggravating circumstances far outweigh any circumstances which would mitigate the sentence in this case.

WHEREFORE, the Court finds that the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL. by his willful, deliberate, malicious and premeditated act took the lives of GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN without justification or excuse. The Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, knew full well the seriousness and the ultimate consequences of broke and entered the dwelling house of ANN HERRMANN with

the intent to rob and kill the occupants therein. The Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, in an extremely heinous, atrocious and cruel manner strangled GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN to death. The Court finds that based on all the facts and circumstances presented the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, has been and would continue to be a menace to society and therefore must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida.

Dated and Filed in this cause this 9th day of April, 1974, at Tampa, Hillsborough County, Florida.

/s/ Robert W. Rawlings, Jr.
CIRCUIT JUDGE